

HIGH COURT OF CHHATTISGARH, BILASPURCivil Revision No.74 of 2017

Ghanshyam Tandon, Aged about 42 years, R/o Housing Board Colony, Qr No.13, Bacheli, Tehsil Dantewada, District South Bastar, Dantewada (C.G.)
 ---- Applicant

Versus

Aruna Tandon, Aged about 41 years, R/o Type 1, Qr No.37, Bacheli, Tehsil Dantewada, District South Bastar, Dantewada (C.G.)
 ---- Non-applicant

For Applicant:	Miss S. Harshita, Advocate.
For Non-applicant:	Mr. Sanjeev Verma, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

04/09/2018

1. Applicant / plaintiff – Ghanshyam Tandon filed a suit under Section 13 of the Hindu Marriage Act, 1955 for dissolution of his marriage with the non-applicant herein in which notice was said to have been served to the non-applicant on 10-3-2015 for her appearance on 19-3-2015, but on 19-3-2015, the trial Judge proceeded on leave and the Reader of the Court fixed the date of hearing as 7-4-2015. However, since the non-applicant herein did not appear on 7-4-2015, the trial Court proceeded ex parte on 7-4-2015 and ultimately, granted decree of dissolution of marriage on 30-9-2015.
2. On 18-2-2016, the non-applicant herein filed an application under Order 9 Rule 13 of the CPC for setting aside the ex parte decree stating that she came to know about the decree on 20-1-2016 from Police Station Bacheli that decree for divorce has been passed in favour of the applicant herein. The said application has been allowed by the trial Court by the impugned order dated 11-1-2017 holding that sufficient cause has been shown for non-appearance when the suit

was called-up for hearing and the dispute relates to matrimonial dispute between husband and wife. Questioning that order, the instant revision has been preferred by the husband.

3. Miss S. Harshita, learned counsel appearing for the applicant / plaintiff – husband, would submit that the non-applicant was served with notice on 10-3-2015 for hearing on 19-3-2015 and as such, by virtue of the second proviso to Rule 13 of Order 9 of the CPC, the non-applicant had the notice of date of hearing and sufficient time to appear and answer the plaintiff's claim and, therefore, it will not be treated as a ground to set aside the decree mainly on the ground that there has been irregularity in service of notice under the second proviso to Order 9 Rule 13 of the CPC, as such, the order impugned deserves to be set aside.
4. On the other hand, Mr. Sanjeev Verma, learned counsel appearing for the non-applicant – wife, would support the impugned order.
5. I have heard learned counsel for the parties and considered the rival submissions made herein-above.
6. As noticed herein-above, the trial Court issued summons to the non-applicant fixing the date of hearing on 19-3-2015 which (notice) was said to have been served to the non-applicant on 10-3-2015, but on 19-3-2015, the Presiding Officer of the trial Court remained on leave and the Reader of the Court fixed the date of hearing on 7-4-2015 and on that date, the non-applicant herein / defendant was proceeded ex parte and ultimately, ex parte decree was passed.
7. The question would be, whether the date fixed by the Reader of the Court can be said to be the date of hearing empowering the trial Court to proceed ex parte?

8. This question is no longer *res integra* and stood decided by a Division Bench of the M.P. High Court in the matter of Laxmibai (Smt.) v. Keshrimal Jain¹ in which it has been held that if the Presiding Officer is on leave on the date fixed for hearing, fresh notice should be issued, as the date fixed by the Reader of the Court is not the date of hearing. Their Lordships observed as under:-

“8. ... There is yet another reason to hold that the appellant/defendant was not duly served, in the summons, the date of appearance was 21.7.1981, on that date, the Presiding Officer was on leave. Therefore, the next date fixed by the Reader of the Court, was not a date of hearing; hence, the Court ought to have issued a fresh notice to the defendant, but instead of that, the Court illegally proceeded *ex parte* on the assumption that the defendant was absent on 21.7.1981 and is also absent on the date fixed by the Reader. In such a situation, when a date given in the notice of summons is declared holiday or the Presiding Officer is on leave, unless another date is notified by issue of a fresh summons or by exhibiting a date on the Notice Board, a Court cannot proceed *ex parte*, till the next date is notified, a defendant is not bound to attend and may wait for another notice. See, *Raghurajsingh v. Kalyanaprasad* (1964 JLJ SN 78) *Kranti Kumar Jha v. Dr. J.B. Shrivastava* (1978-I-MPWN 443); *Mohanlal Brijlal v. Manga* (1986-CCLJ N-39); *Sushila Bai v. Ram Nihore* (1991 MPLJ 229). Therefore, for the above reasons, the Court was having no jurisdiction to proceed *ex parte*; the error is apparent and the decree so passed is illegal and is liable to be set aside, even for argument's sake the above grounds relate to invalid service making out a case amounting to sufficient cause, and ought to have been taken in a proceeding under Order IX, rule 13, CPC, ...”

9. In the aforesaid judgment it has been clearly held that since the date of hearing was fixed by the Reader of the Court, the Court was having no jurisdiction to proceed *ex parte*; the error is apparent and it would constitute sufficient cause to take into consideration in a proceeding under Order 9 Rule 13 of the CPC. In fact, in the present case, no fresh notice was issued by the trial Court and as such, it is a case of invalid service of notice and that would be a sufficient cause to set aside the *ex parte* decree.

¹ 1994 JLJ 747

10. Coming back to the submission of Miss Harshita, learned counsel for the applicant / plaintiff, that since service of summon was served to the non-applicant / defendant on 10-3-2015, therefore, decree cannot be set aside by virtue of the second proviso to Order 9 Rule 13 of the CPC, it would be apposite to notice the second proviso to Rule 13 of Order 9 of the CPC which reads as under: -

“Provided further that no court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.”

11. It is, therefore, clear that the legal position under the amended Code is not whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order 5 of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim of the plaintiff. Once these two conditions are satisfied, an *ex parte* decree cannot be set aside even if it is established that there was irregularity in service of summons. If the court is convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared and answered the plaintiff's claim, he cannot put forward a ground of non-service of summons for setting aside *ex parte* decree passed against him by invoking Rule 13 of Order 9 of the Code. (See Sunil Poddar and others v. Union Bank of India².)

12. In the case in hand, it is a case of invalid service of notice, it is not the case of irregularity in service of summons, therefore, the second proviso to Order 9 Rule 13 of the CPC as well as the decision of the Supreme Court in Sunil Poddar (supra) would not be applicable.

² (2008) 2 SCC 326

13. As already held, the date on which the trial Court proceeded *ex parte* i.e. 7-4-2015 was the date fixed by the Reader of the Court and it was not the date fixed for hearing and therefore the trial Court has no jurisdiction to proceed *ex parte* on the basis of date fixed by the Reader and that is the error apparent on the face of record and as such, the decree passed is illegal and liable to be set aside and has rightly been set aside by the trial Court restoring the suit for hearing on merits in accordance with law. I do not find any merit in the revision, the revision is liable to be and is hereby dismissed leaving the parties to bear their own cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

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