

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**FAM No. 53 of 2018**

- Smt. Sujata W/o Vinayak Borkar Aged About 50 Years R/o Civil Line Gondiya, Tahsil And District Gondiya (Maharashtra)

---- Appellant**Versus**

- Vinayak S/o Anantram Borkar Aged About 56 Years R/o House Of Kalarens Harsda, Tikrapara, Rajnandgaon, District Rajnandgaon, Chhattisgarh, Present Address Kalkapara, Ward No.9, Misiyabada, Dongargarh, Tahsil And District Rajnandgaon, Chhattisgarh

---- Respondent

For Appellant	:	Shri C.R.Sahu, Advocate
For Respondent	:	Shri B.P.Singh, Advocate

Hon'ble Shri Justice Manindra Mohan Shrivastava**Hon'ble Shri Justice Gautam Chourdiya****Order On Board****20/08/2018****Per Manindra Mohan Shrivastava, J.-**

1. This appeal is directed against impugned order dated 26/10/2017 passed by the Family Court, Rajnandgaon whereby the appellant's application for condonation of delay in filing application for setting aside ex-parte divorce decree has been rejected.

2. Briefly stated, facts of the case are that the respondent / husband moved an application for grant of decree of divorce against the appellant / wife on the ground of desertion. Summons were issued to the defendants by post and after receiving the postal receipt information, learned Trial Court proceeded with the case. It was

recorded that as the appellant / defendant has not appeared despite service of summons by post, therefore, the appellant be proceeded ex-parte. Learned Family Court recorded evidence and thereafter, proceeded to pass ex-parte judgment and decree on 18/09/2014 granting a decree of divorce on the ground of desertion.

3. The appellant herein then moved an application under Order 9 Rule 13 CPC for setting aside ex-parte judgment and decree dated 18/09/2014 mainly on the ground that she did not receive any notice of the case and procedure for service of notice by afixation was not complied with. It was stated that she resides at Civil Lines, Gondia and she did not receive any summons from the Court or any notice or any postal document regarding institution of the case by the respondent. The appellant, for the first time, came to know on 13/07/2015, regarding passing of ex-parte decree whereafter, an application for grant of certified copy was submitted on 14/07/2015. Copy was received on 21/07/2015 and then the application was filed before the Court.

4. An application for condonation of delay of 309 days was also filed along with miscellaneous application for setting aside ex-parte decree containing similar averments relating to non-service of summons, late information regarding ex-parte judgment and decree.

The application was opposed by the respondent by stating that the appellant had duly been served with the notice by speed post which was duly delivered as proved from track result prepared by postal authority.

5. Learned Court below, vide impugned order, placing reliance upon the track result of the postal service of the summons on the appellant / defendant, came to the conclusion that the appellant was duly served with the summons of the divorce suit and despite that, she did not appear and therefore, explanation for condonation

of delay of 309 days cannot be said to be sufficient for condonation of delay.

6. Learned counsel for the appellant argued that the learned Court below, while rejecting the application for condonation of delay, has failed to take into consideration relevant provisions with regard to service of notice on the defendant who resides outside the jurisdiction of the Court as provided under Order 5 Rule 21 CPC. It is submitted that notices were required to be sent by whichever mode, but to the Court within whose jurisdiction, the appellant resided. It is further submitted that the Court ought not to have acted upon the track result of the postal department when the appellant asserted that she did not receive summons because there is no acknowledgment bearing signature of the appellant that she was duly served with the summons of the suit. By impugned judgment and decree, divorce has been declared between the parties which is a serious consequence and the Court below ought to have afforded an opportunity of hearing to contest the matter on merits as the appellant suffered a decree of divorce resulting in termination of marital relationship between the parties.

7. On the other hand, learned counsel for the respondent supports the order passed by the learned Family Court and submits that in the absence of factual dispute made to the service of summons through postal service and the correctness of the track result, the appellant is not entitled to shield on technical grounds that notice under Order 5 Rule 21 was not served upon her. The appellant having failed to explain the long delay, application for condonation of delay was rightly rejected by the Family Court.

8. After having heard learned counsel for the parties, we are of the view that the impugned order is liable to be set aside on the ground that service of summons on the appellant has not been effected in accordance with the provisions of law.

9. It is not in dispute that the appellant / wife -Smt. Sujata was and is resident of Gondia which is not only outside jurisdiction of the Court where respondent filed application for grant of decree of divorce but also outside the State of Chhattisgarh. In such a case, where summons is required to be served outside the jurisdiction of the Court, provisions under Order 5 Rule 21 CPC would be applicable which provides service of notice in the following manner -

“Rule 21- Service of summons where defendant resides within jurisdiction of another Court – A summons may be sent by the Court by which it is issued, whether within or without the State, either by one of its officers [or by post or by such courier service as may be approved by the High Court, by fax message or by Electronic Mail Service or by any other means as may be provided by the rules made by the High Court] to any Court (not being the High Court) having jurisdiction in the place where the defendant resides.”

10. A plain reading of the provisions would clearly show that the summons are required to be sent to the Court within whose jurisdiction the defendant resides. As to what could be the mode of sending summons to that Court having jurisdiction, the provision provides that it could be by any of the officer of the Court or by post or by some other mode specifically enumerated therein. However, what is significant is that summons have to be sent to the concerned Court within whose territorial jurisdiction the defendant resides and not upon the defendant.

11. Further, Rule 23 casts duty on the Court to which the summons is sent to get it duly served on the defendant and return the summons to the Court of issue, together with the record of its proceedings, if any.

12. It is, therefore, clear that the service of summons on the defendant had not

taken place in accordance with the provisions of law. The appellant had categorically stated that she never received any summons through postal service. There is no acknowledgment submitted before the Court by the defendant to show that the appellant had acknowledged receipt of summons by the postal authorities.

13. The respondent filed an application for grant of decree of divorce and it has also been allowed. If in the above circumstances, the appellant is not afforded an opportunity to contest the matter on merits, it would result in miscarriage of justice. Therefore, in view of the above consideration, we are inclined to set aside the impugned order and we also direct that Misc. Civil Suit No.03/2015 shall be restored to its file and number in the Court of Family Court, Rajnandgaon and the application would be decided on its own merits as we are inclined to condone the delay in filing ex-parte decree of divorce. The appeal is accordingly allowed.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Gautam Chourdiya)
Judge