

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

FIRST APPEAL NO. 2815 OF 2017
WITH CA/9798/2017 IN FA/2815/2017

- 1 Jayshri Gajendra Mahajan,
Age 30 years, Occu. Nil
- 2 Kanak Gajendra Mahajan,
Age 8 years, Occu. Education,
U/g through Appellant No.1
Both R/o. C/o. Subhash Vithal Navvade,
R/o. Bhadgaon (Peth),
Tq. Bhadgaon, Dist. Jalgaon.

.. Appellants

Versus

Gajendra Pandit Mahajan,
Age 37 years, Occu. Service,
R/o. Near Saibaba Temple,
Lalbag Burhanpur,
Tq. and Dist. Burhanpur (MP).

.. Respondent

...

Shri. Girish V. Wani, Advocate for Appellants.
Shri. Anand I. Deshmukh, Advocate for sole Respondent.

...

CORAM : A. M. DHAVAL, J.

DATED : 7th AUGUST, 2018.

JUDGMENT :-

This is an appeal filed by wife challenging the Judgment and Order dated 16th June, 2017, passed by the District Judge -5, Jalgaon, in Miscellaneous Civil Application No. 85 of 2016, under Section 25 of the Guardians and Wards Act, 1890, whereby the custody of a minor girl aged 7 years is ordered to be handed over to the father.

2. The grievance of the appellant as argued by learned Advocate Shri. Girish V. Wani is that there was no proper service on the appellant, still the trial Judge proceeded ex-parte against her.

3. I have perused the record and proceedings of the trial Court. As per the record, notice dated 07-03-2017 was issued in the name of appellant and her minor daughter. The bailiff visited her house on 18-03-2017. That time, her daughter and appellant were out of station. It is alleged that the father of appellant No.1 has refused to accept the notice and the noticee were not found. Hence, notice was returned unserved. Earlier notice was also sent by Registered Post Acknowledgment Deed (RPAD) and the envelope was returned unserved with an endorsement that an intimation was given to the noticee. But, she did not visit the post office for collecting envelope. In the Judgment, learned trial Court has merely observed that notice has remained unserved, though, notice was sent to opponent No.1 through RPAD, but it returned with an endorsement as unserved. Therefore, the matter proceeded ex-parte against both the opponents.

4. The points for my determination and findings thereon are as follows :-

Nos.	Points		Findings
1	Whether the learned Trial Judge proceeded rightly ex-parte against the appellants ?	..	In the negative.
2	What order ?	..	As per final order.

REASONS

5. The basic feature of *Principles of Natural Justice* is to give fair

opportunity of hearing to the other side. The rule of fair trial contemplates that nobody should be condemned unheard. It is no doubt true that if some party is duly served in civil matter, but does not appear, the Court can proceed ex-parte against such party, but, there should be proper service of notice and Court should record the findings of its satisfaction of proper service and still the party was not attending the Court.

6. The impugned ex-parte judgment merely states that the notice was issued to opponent No.1 through RPAD, but the same was returned with an endorsement as unserved. It is needless to state that this was not a case of proper service and the learned trial Judge has no discretion to proceed ex-parte only on the basis of finding that the notice was unserved.

7. Order V of the Code of Civil Procedure, 1908 (in short, CPC) deals with issue and service of summons. It is well settled that personal service on the party through bailiff and obtaining the acknowledgment of party is the best service. But, if it could not be served on the party, it could be served on any adult member of the family. In the present case, the notice was sent initially by RPAD and the envelope has returned with endorsement D/L 23-08-16 and 24-08-16. An intimation was given on 25-08-2016 and as the addressee did not visit the post office for collecting the registered post envelope, it was returned as unserved. The envelope nowhere shows that it was refused by the noticee i.e. Appellant herein. Thereafter, summons was reissued through bailiff. That time the opponent was not there. The papers disclose that the notice was issued for the first time on 13-06-

2016 and the first notice issued returned unserved as the bailiff did not get sufficient time for service.

8. This is a custody matter of a child before the Additional District Judge-5, Aurangabad, who was expected to be sensitive to the rights of the parties and was bound to verify the record before passing ex-parte order. In the first place, there was no attempt to serve the notice dated 14-08-2016 for want of time, still the Advocate for appellant filed false application dated 20-08-2016 (Exhibit-7) that the opponent No.1 was avoiding to accept the notice. There was no material to accept the statement, still the Court proceeded with the application. Pertinently, the claim was filed at Jalgaon and the present appellant was residing with her father at Bhadgaon, District Jalgaon. As per Order V of the CPC, there is no provision of effecting service by mere RPAD. Still, the application was casually allowed. When there was no service by RPAD, still the ex-parte order was passed. The RPAD envelope does not bear the endorsement as not claimed, still the order shows that there was an endorsement as not claimed. Even if, it is assumed to be true, still such endorsement does not mean that it is endorsement of refusal to accept the service. Even if, there would have been refusal to accept the service as per Order V, Rule 17 of the CPC, service by pasting/affixing the copy of notice + plaint on the outer door or some other conspicuous part of the house was essential alongwith the report to that effect of the bailiff. No such efforts were made. Only one attempt was made through bailiff when the opponent was not found in house. This type of casual approach by a District Judge in the sensitive matter of child custody for proceeding exparte without application of

mind was not expected. As there was no service of notice, the impugned ex-parte Order and Judgment is not tenable and deserves to be set-aside.

9. At this stage, Shri. A. I. Deshmukh, learned Advocate for the respondent submits that sufficient period has lapsed and there was order in favour of the respondent. Considering the facts, the respondent should get interim custody or atleast rights of visiting. Since, I am setting aside the ex-parte order, the learned trial Judge will have the jurisdiction to decide the prayer of interim relief like interim custody or right of visitation. Without expressing any opinion on the merits, it is clarify that the respondent is at liberty to make such application if he so desires. It will be decided by the trial Judge on its own merits according to provisions of law. With these observations, the appeal deserves to be allowed. Hence, the order :-

ORDER

1. The appeal is allowed.
2. The ex-parte Judgment and Order passed by learned District Judge – 5, Jalgaon, in Miscellaneous Civil Application No. 85 of 2016 dated 16-06-2017, stands set aside.
3. The matter is remanded to the concerned Judge for reconsideration.
4. Learned Advocates for the parties agree to keep their clients present before the learned Judge, Aurangabad, on 28th August, 2018.
5. No order as to the costs.
6. Pending civil application, if any, stands disposed of.

[A. M. DHAVAL]
JUDGE