

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

FAMILY COURT APPEAL NO.13 OF 2018

Sachin S/o. Arvindrao Mahajan,
Age-40 years, Occu-Nill,
R/o. N-9, L-137/1,
Shivaji Nagar, Cidco,
Renukamata Mandir Parisar,
Aurangabad

**...Appellant
(Ori. Respondent)**

VERSUS

Vrushali W/o. Sachin Mahajan,
Age-39 years, Occu-Private Job,
R/o. C/o. Ramrao Naygaonkar,
C-16, Mirajgave Vishw,
Near to Beed By Pass Road,
Aurangabad

**...Respondent
(Ori. Petitioner)**

Mr.R.H.Wagh, Advocate for the appellant
Mr.D.V.Katneshwarkar, Advocate for respondent

**CORAM : PRASANNA B. VARALE
& S.M. GAVHANE, JJ.**

RESERVED ON : 15.06.2018

PRONOUNCED ON : 10.07.2018

J U D G M E N T [PER: S.M.GAVHANE, J.]

. The appellant-husband (hereinafter referred to as 'the respondent') against whom decree of dissolution of marriage has been passed on 14.09.2017 in the petition No.A-252/2016 filed by the respondent-wife (hereinafter

referred to as 'the petitioner') by the Principal Judge, Family Court, Aurangabad on the ground of cruelty and desertion under section 13(1)(i-a) and (i-b) of the Hindu Marriage Act, 1955, has preferred this appeal being aggrieved by the said decree. With the consent of the learned counsels appearing for the parties, the appeal is heard finally at the admission stage as per order dated 26.03.2018.

2. Facts in brief are thus;

A] The marriage between the petitioner and the respondent was solemnized on 23.06.2007 as per Hindu rites and custom at Aurangabad. They have one son Shaunak born on 09.06.2009 from the said wedlock, who has been residing with the petitioner.

B] According to the petitioner/wife prior to the marriage, she was told that the respondent is serving at Pune. After the marriage when she went to Aurangabad with the respondent for cohabitation in the joint family, she came to know that the respondent does no work. Thereupon, when she asked the respondent about his service, he told her not to ask him anything and as such insulted her. After some days, the petitioner went to Pune and started

residing with the brother and brother's wife of the respondent. The petitioner alleges that the respondent is addicted to voices of liquor, tobacco and guthka. The respondent had cheated her saying that he is serving. The brother and brother's wife of respondent were insulting the petitioner and starving her.

C] Further, it is the case of the petitioner/wife that she started serving at Pune. The brother and brother's wife of the respondent used to tell the petitioner to give her entire salary in the house and used to ask the petitioner to bring money which she requires from her father. In case, she comes late from the service, the respondent used to suspect her character and used to abuse and beat her. So also, brother and brother's wife of the respondent used to insult the petitioner and used to drive her out of the house in the night saying her that she should not stay there. The respondent also used to say her to go to her parental house saying that due to her, his brother and brother's wife are not maintaining him.

D] After some days, the respondent got service at Pune and the petitioner and the respondent went to reside in rented house at Pune. The respondent used to say her

that against his wish, his father has performed his marriage with her and that he married with her, though he was not liking her. He used to say that he has got good job and therefore, he would get good girl and therefore, he does not need the petitioner. He has started consuming more liquor after he got service and used to say the petitioner that he does not want to cohabit with her and used to drive her out of the house in the night. It is contended that when the petitioner was pregnant, the respondent has started saying that she is not pregnant from him and assaulted her and therefore, there was abortion on 19.06.2008. The petitioner was again pregnant in October, 2008. The respondent used to say her that said pregnancy is not from him and that she should terminate the pregnancy and he was assaulting her while under the influence of liquor. On 09.06.2009 after birth of son, the respondent did not come to see the child. Thereafter, the petitioner went to Pune. Thereafter, also the respondent used to abuse the petitioner on consuming liquor and due to his behavior he lost his service in April, 2009. In February, 2010 the petitioner went to her parents house for marriage of her brother, at that time he had taken out her all the ornaments. The respondent did not come to take her and to meet her son. According to the petitioner, the respondent has compelled her to

stay with her parents from February, 2010 to May, 2012. Again in April, 2013, the petitioner went to reside at Aurangabad in joint family of the respondent and he went to reside at Pune. It is alleged that on 06.04.2014 the respondent drove her out of the house under the influence of liquor and as such deserted her for more than two years prior to filing the petition. Thus, the petitioner/wife claimed divorce on the grounds of cruelty and desertion by filing the petition.

E] Said petition proceeded ex-parte against the respondent/husband as per order dated 01.08.2017 below Exh.19.

F] On considering the sole unchallenged evidence on affidavit (Exh.20) of the petitioner, the learned Judge of the Family Court held that the petitioner has proved that, the respondent has treated her with cruelty, the petitioner has proved that the respondent has deserted her continuously for two years prior to filing of the petition and further on holding that the petitioner is entitled to dissolution of marriage, passed the impugned decree dissolving the marriage between the petitioner and the respondent solemnized on 23.06.2007 on the ground of cruelty and desertion as mentioned in detail in the

introductory para, leaving the parties to bear their own cost. Aggrieved by the said decree, this appeal is filed by the respondent/husband.

3. Mr. Wagh, learned counsel appearing for the respondent/husband submitted that the learned Judge of the Family Court erred in passing ex-parte decree of divorce. The learned Judge has failed to appreciate the fact that there is no compliance of Rule 19 of the Family Court Rules as well as compliance of Rule 17 and 19 of the Order-V of the Code of Civil Procedure by Serving Officer/ bailiff while serving the summons (Exh.18) on the respondent and submitting report dated 30.06.2017. After receiving said report on summons (Exh.18) the learned Judge of the Family Court passed an order dated 01.08.2017 on application (Exh.19) of the petitioner/wife, that respondent is served with summons. Referring to said order, the learned Advocate appearing for the respondent submitted that the learned Judge of the Family Court did not ask the Serving Officer/Bailiff to file affidavit in support of his report dated 30.06.2017, on summons (Exh.18). In fact, the learned Judge ought to have asked Bailiff to file affidavit as above. It is submitted that even if, Bailiff gives his report on affidavit still discretion is with the Court

to examine him in order to ascertain; whether his report is correct or not?. So also, before passing above said order dated 01.08.2017 on Exh.19 regarding service of summons on respondent on the basis of Bailiff report on Exh.18, the learned Judge has not considered that the Bailiff report is not in the light of Rule 17 and the learned Judge has not examined Bailiff in the light of Rule 19 of Order-V of the Code of Civil Procedure.

4. Learned Advocate appearing for the respondent/husband referring to the Roznama dated 28.02.2017 (Page No.25) in petition No.A252/2016 submitted that as per said Roznama, the respondent was absent and summons was returned unserved for the reasons that the house was locked and brother of the respondent had refused to accept the same. Said roznama further shows that the respondent was attending the Court in the proceeding under the Domestic Violence Act and therefore, the petitioner was asked to serve the respondent accordingly and hence the petitioner had again given application to issue summons through bailiff. Inviting our attention to this roznama, the learned Advocate submits that instead of taking steps as above as directed by the Court to serve summons on respondent while present in court in proceeding under the Domestic Violence Act,

the petitioner applied for summons through bailiff as the petitioner was interested to proceed in the proceeding in the absence of respondent.

The learned Advocate for the respondent has thus submitted that as there was no compliance of procedure laid down in the Rule 19 of the Family Court Rules, 1988 and Rule 17 and 19 of Order-V of the Code of Civil Procedure, the order dated 01.08.2017 of the learned Judge of the Family Court holding that the respondent is served and proceeding ex-parte against him, is not correct. Therefore, as passing of impugned decree of divorce is violating principles of natural justice, as no proper opportunity of hearing was accorded to the respondent/husband, the said ex-parte decree is liable to be set aside by allowing the appeal and the respondent/husband needs to be given an opportunity to contest the proceeding by giving appropriate directions to the Family Court to decide the petition afresh after remanding the same.

5. To support his submissions learned Advocate appearing for the respondent/husband has relied upon the decision of the Division Bench of this Court in the Case of Deepali W/o. Irappa Sonwane Vs Pratap Irappa Sonwane

reported in 2015(3)ALL MR 341. In the said case, the petition seeking dissolution of marriage on the grounds of cruelty and desertion under Section 13(1)(i-a),(i-b) of the Hindu Marriage Act, 1955 was filed by respondent/husband against the appellant/wife in the Family Court, Aurangabad. The petition proceeded ex-parte against the appellant/wife as she refused to accept the summons as per bailiff report dated 17.11.2011. Accordingly ex-parte decree of dissolution of marriage was passed. The appellant/wife who was respondent in the original petition challenged the said decree before the High Court by an appeal on the ground that there was no compliance of Rule 19 of the Family Court Rules and Rules 17 and 19 of Order-V of the Code of Civil Procedure regarding service of summons on her. In the appeal, the Division Bench held that proof of service of summons is essential condition for proceeding ex-parte. Hence in absence of such proof, ex-parte decree of dissolution of marriage cannot be sustained. So also, it was held that even if, bailiff gives his report on affidavit, discretion is with Court to examine him in order to ascertain whether his report is correct or not. The Family Court Appeal was allowed and the impugned judgment and decree was quashed and set aside and petition was remanded back to the Family Court to decide the same

afresh after granting an opportunity of hearing to both the parties.

6. On the other hand Mr. Katneshwarkar, learned Advocate appearing for the petitioner/wife submits that the respondent/husband refused to accept the summons as per Bailiff report dated 30.06.2017 on summons (Exh.18). Therefore, the learned Judge of the Family Court was right in passing the order dated 01.08.2017 on Exhibit-19 and petition was rightly proceeded ex-parte against the respondent. The petitioner and the respondent are residing separate for more than four years and therefore, it would not be in the interest of the parties to upset the impugned decree of divorce as requested by the respondent/husband. Learned Advocate appearing for the petitioner/wife has thus supported the impugned judgment and decree and prayed to dismiss the appeal.

7. We have carefully considered the submissions made by the learned Advocates appearing for both the parties and with their assistance, we have perused the record and proceeding in petition No.A-252/2016 and the evidence adduced by the petitioner.

8. Considering the submissions, only point that

arises for our determination is; whether the learned Judge of the Family Court, Aurangabad erred in passing ex-parte decree by holding service of summons on respondent/husband, as proper and legal?

9. To appreciate the argument advanced by the learned Advocate appearing for the respondent/husband, it is necessary to refer Rule 19 of the Family Court Rules, 1988 and order-V Rules 17 and 19 of the Code of Civil Procedure:

The Rule 19 reads as under:

“Unless the Court shall otherwise order, the Service of a Summons to appear and answer shall be provided by the *Vakalatnama* having been filed or when no *Vakalatnama* has been filed, by evidence showing that the Summons was served in the manner provided by the Code of Civil Procedure. Such proof shall ordinarily be by the affidavit of the bailiff and (as to such matters as the bailiff cannot speak to of his knowledge) of the person who attended the bailiff for the purpose of identification at the time of service, or of such other person or persons as can speak to the identity of the person served or to other matters necessary to be proved in respect of the service.”

10. On perusal of Rule 19 of the Family Court Rules, it is clear that Unless the Court shall otherwise order the service of summons to appear and answer shall be provided by the *Vakalatnama* having been filed or when no *vakalatnama* has been filed, by evidence showing that the summons was served in the manner provided by the Code of

Civil Procedure. In the present case admittedly, no vakalatnama has been filed on behalf of respondent/husband in the petition before the Judge, Family Court so as to prove the service of summons on the respondent naturally therefore, the petitioner will have to show that the summons was served on the respondent in the manner provided by the Code of Civil Procedure in the light of second part of Rule 19 of the Family Court Rules by the affidavit of the Bailiff and of the person who attended Bailiff for the purpose of identification at the time of service. Admittedly, in the present case Bailiff has not filed affidavit regarding service of summons on the respondent and he has only given report dated 30.06.2017 on summons Exh.18 as referred earlier. So also, there is no affidavit of person who attended the Bailiff for the purpose of identification at the time of service of summons on the respondent. Thus, it is obvious that there is no compliance of Rule 19 of the Family Court Rules.

11. Rules 17 and 19 of Order-V of the Code of Civil Procedure read as under:

Rule 17. Procedure when defendant refuses to accept service, or cannot be found:

Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgement, or where the

serving officer, after using all due and reasonable diligence, cannot find the defendant, (who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time) and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, 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 (if any) by whom the house was identified and in whose presence the copy was affixed.

Rule 19. Examination of Serving Officer:

Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

12. As regards the interpretation of Rules 17 and 19 of order-V of Code of Civil Procedure the Division Bench in the case of Deepali (supra) has interpreted the said rules in paragraph Nos. 12 and 13 which are reproduced as under:-

12. Basically service of summons is to be made by delivering a copy thereof to the concerned party apart from other modes of

service prescribed in the Code of Civil Procedure. In the instant case, the attempt of service is shown to have been made at the premises of the Family Court, Aurangabad. Perusal of Rules 17 and 19 of Order-V of the Code of Civil Procedure show that in order to accept the service as valid service, particularly, when the report is to the effect that the respondent refused to accept the summons then, it become duty of the Court to examine the Process Serving Officer/Bailiff if his report is not on affidavit. Even if the Process Serving Officer gives his report on affidavit, discretion is with the Court to examine the Process Serving Officer in order to ascertain, whether his report of is correct or not in order to hold the service valid. After complying with these mandatory requirements, the court is require to declare, whether the summons is duly served or not.

13. Harmonious construction of Rules 17 and 19 of Order V of the Code of Civil Procedure goes to show that acceptance of report of the service of the summons is a serious and solemn act and not merely an empty formality. Object to serve summons on the respondent is to enable him to know about institution of the proceedings against him and enable him to resist the said proceeding filed against him. Law of procedure is framed in such a manner that principle of natural justice is scrupulously followed. The basic requirement of this rule is that the decision should not be reached behind back of the affected party and such party should not be precluded from participating in the proceeding. Therefore, it becomes the prime duty of the Court concerned to see that all procedural requirements are duly adhered to prior to proceeding ex-parte against the concerned party to the litigation.

13. In the present case, report dated 30.06.2017 of the Bailiff on summons (Exh.18) reads thus:

सदर समन्समधील प्र.वादी यांच्या दिलेल्या पत्त्याच्या ठिकाणी जावून तपास करता प्र.वादी समक्ष भेटले. त्यांनी समन्समधील स्वतःचे नांव कबूल करून स्वतःचे नावाचे प्रत घेण्यास नकार दिला व लावू दिले नाही. सबब सदर समन्स न बजावता मे. कार्टा परत मे. जा. व्हावे.

ता. ३०.०६.२०१७

14. It is clear from the above report that the bailiff has not affixed the copy of summons on the outer door of the house of the respondent as per Rule 17 of Order-V of the Code of Civil Procedure. It appears that relying upon the above said Bailiff report the petitioner/wife had filed application (Exh.19) to pass ex-parte order in the proceeding against the respondent and on the said application, the learned Judge has passed the order dated 01.08.2017 which reads thus:

Allowed. Since NA has refused to accept the notice as per the report of Bailiff vide Exh.18. Hence is served.

Date:01.08.2017

15. Thus, it is obvious from the above order dated 01.08.2017 that the learned Judge of the Family Court has passed the said order of service of summons on the respondent only relying upon the Bailiff report which was not on affidavit and although the Bailiff has not followed the procedure as per Rule 17 of Order-V of the Code of Civil Procedure of affixing copy of summons on the outer door of the house of the respondent on alleged refusal of respondent to accept the summons. In these

circumstances, in fact, before passing the order of service of summons on the respondent-husband, as observed by the Division Bench in the case of Deepali (supra) it was the duty of the court to examine Process Serving Officer/Bailiff if his report is not on affidavit. But, admittedly, the Process Serving Officer/Bailiff was not examined by the Judge of the Family Court to ascertain; whether his report dated 30.06.2017 is correct or otherwise? Thus, there is no compliance of Rules 17 and 19 of the Order-V of the Code of Civil Procedure as no procedure laid down in the said Rules was followed by the Process Serving Officer/Bailiff and also by the learned Judge of the Family Court by examining the Serving Officer/Bailiff. Therefore, applying the ratio in the case of Deepali (supra) laid down by the Division Bench of this Court, we hold that the order dated 01.08.2017 (Exh.19) regarding service of summons on the respondent/husband passed by the learned Judge of the Family Court to proceed ex-parte against the respondent is not proper as there was no proper service of summons on him. Therefore, impugned ex-parte decree of dissolution of marriage passed on the basis of said ex-parte order dated 01.08.2017 is against principles of natural justice as no proper opportunity was accorded to the respondent/ husband and the same cannot be sustained

on the said ground alone. Therefore, we do not wish to consider the aspect; whether sole oral unchallenged evidence of the petitioner/wife is sufficient to hold that the respondent has caused cruelty to her or deserted her, so as to entitle her to decree of dissolution of marriage. For the reasons aforesaid, we answer above formulated point in the affirmative and hold that the impugned decree needs to be set aside by allowing the appeal and petition needs to be remanded back to the family Court for deciding the same afresh with certain directions. Hence the following Order is passed.

O R D E R

- i. The appeal is allowed.
- ii. The impugned judgment and decree dated 14.09.2017 passed by the Principal Judge, Family Court, Aurangabad in Petition No.A-252/2016 of dissolving the marriage between the petitioner and respondent is quashed and set aside.
- iii. Petition No.A-252/2016 is remanded back to the Principal Judge of the Family Court, Aurangabad with direction to decide the same afresh after

granting an opportunity of hearing to both the parties according to law, within three months from the date of receipt of this order.

iv. Record & Proceedings be sent back to the Family Court, Aurangabad forthwith.

v. Parties shall bear their own costs.

[S.M.GAVHANE, J.]

[PRASANNA B. VARALE, J.]