

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.1112 of 2018

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Manoj Kumar Das S/o Late Saryug Das Resident of Bari Mahuli,P.S.
Muffasil,Dist.Munger

... .. Appellant/s

Versus

Asha Kumari W/o Manoj Kumar Das,D/o Yugeshwar Ram Resident of
Brahampura,Sotiya,P.S. Kamtaul,Dist.Darbhanga at present residing Nirmala
Narayan,Flat No.2/A Konark Apartment, Panchmukhi Hanuman Mandir,East
Boring Canal Road,Patna P.S. Budha Colony,Dist.Patna

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Kamal Kishore Jha
For the Respondent/s : Mr. Satyendra Prasad

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH

and

HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH)

Date : 25-09-2020

Heard learned counsel for the appellant and
learned counsel for the respondent.



The present Miscellaneous Appeal is directed against the order dated 22.11.2018 passed by the learned Principal Judge, Family Court, Munger in Miscellaneous Case No. 167 of 2014 whereby the ex-parte judgment and decree dated 19.6.2013 and 29.6.2013, respectively, passed in Title Suit (Matrimonial) Case No. 219 of 2012 has been set aside the said Title Suit (Matrimonial) case has been restored to its original file.

The factual matrix of the case is that the marriage between the appellant husband and the respondent wife was performed in May, 1992 as per Hindu rites and rituals. Subsequently, the married couple were blessed with a female child in 1994. After the birth of the female child, some hostility erupted between the appellant husband and the respondent wife. Consequently, the appellant husband filed Divorce Case No. 46 of 2005 wherein the wife appeared, filed her written statement but subsequently the said matrimonial case was disposed of on the basis of compromise as both the parties agreed to live together. Thereafter, the appellant husband filed Title Suit (Matrimonial) Case No. 219 of 2012 in the Court of the learned Principal Judge, Family Court, Munger under Section 13(1)(ia)(ib) of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act) on the ground of cruelty and



desertion for a decree of divorce on dissolution of marriage.

Since the respondent wife failed to appear in spite of substituted service of notice by way of publication in the daily newspaper “Aaj”, the matter proceeded ex-parte and the matrimonial case was decreed and the marriage was dissolved on the ground of desertion and cruelty vide judgment dated 19th June, 2013 passed in Title Suit (Matrimonial) No. 219 of 2012 by the learned Principal Judge, Family Court, Munger.

The respondent wife challenged the said ex-parte judgment and decree of divorce in Miscellaneous Case No. 167 of 2014 by filing an application under Order IX Rule 13 of the Code of Civil Procedure (hereinafter referred to as the Code) on the ground that the appellant husband was knowing that the respondent wife was staying at Patna and running a beauty parlour, but while adding her as party respondent, deliberately her Darbhanga native place address was given due to which she could not receive any notice.

The respondent wife filed Maintenance Case No. 115M of 2005 wherein she had given her address of Patna in which the appellant appeared and the said maintenance case is still pending and much thereafter, the matrimonial case was filed in 2012 but while appearing in the maintenance case, the



appellant husband did not reveal this fact that the matrimonial case for dissolution of marriage has been filed on his behalf. The appellant husband informed about the ex-parte judgment and decree of divorce much after the date of judgment i.e. 19.6.2013. Hence, Miscellaneous Case No. 167 of 2014 was filed against the judgment and decree of divorce and to allow the respondent wife to contest the suit on merit.

On notice being issued to him, the appellant husband appeared in Miscellaneous Case No. 167 of 2014 and filed his reply to the effect that the wife had full knowledge about the filing of the matrimonial case. On refusal of the wife to reside with the appellant husband, he filed matrimonial case. The matrimonial case was filed much after the filing of the maintenance case.

It was further contended by the appellant that the respondent wife came to know about the disposal of the matrimonial case on 19.6.2013, itself but filed Miscellaneous case after one year and the jurisdiction under Order IX Rule 13 cannot be exercised merely because there is some irregularity in service of notice. The substituted service of notice was made in the matrimonial case by publication of notice in daily newspaper "Aaj" of Patna edition.



The learned Court below tried to reconcile the issue between the parties but, on failure of the mediation, proceeded on merits. The respondent wife filed rejoinder to the reply filed by the appellant husband. In the Miscellaneous case the appellant and the respondent, got themselves examined as witness and admitted that they have one daughter from the first wife, i.e. the respondent and two children who born on 29.11.2010 and 26.5.2012, respectively, from the second wife. The appellant admitted that he did not send any notice to the respondent wife on her address given in the Maintenance Case no. 115M of 2005. He has also not given any information in the said maintenance case about the filing of the divorce case at Munger.

The learned Principal Judge, Family Court, Munger came to a conclusion that in the Title Suit (Matrimonial) No. 219 of 2012, Darbhanga address of the respondent wife was given, whereas in paragraph nos. 8 and 9 of the plaint it has specifically been pleaded that she resides at Patna and runs a beauty parlour. Hence, the learned court below came to a conclusion that the notices were not served upon the respondent wife, as a result, ex parte judgment and decree was set aside and the matrimonial case was restored to its original



file, which is under challenge in the present Miscellaneous Appeal.

Learned counsel for the appellant submits that the respondent wife had full knowledge of the filing of the matrimonial case, notice was issued on the address of her native place at Darbhanga, but deliberately she did not appear and hence the order setting aside the ex-parte judgment and decree of divorce be set aside. It is further submitted that the learned Court below has wrongly exercised the jurisdiction under Order IX Rule 13 of the Code as the substituted service of notice was done by way of paper publication in newspaper “Aaj”. Moreover, the respondent’s permanent address is of Darbhanga and hence, there is no question of non-service of notice to the respondent. The learned Court below on being satisfied over the proof of notice being served, proceeded under Order IX Rule 6(1)(a) of the Code. Hence, a right which has been created in favour of the appellant husband cannot be taken away mechanically by setting aside the decree of divorce.

Learned counsel for the respondent wife submits that the respondent never received any notice and the appellant in the matrimonial suit deliberately and intentionally gave respondent’s address of Darbhanga, in spite of his own



admission in paragraph nos. 8 and 9 of the plaint of matrimonial suit that the respondent is residing at Patna and is running a beauty parlour. Apart from that, in the Maintenance Case No. 115M of 2005, the present address of the respondent wife is of Patna, and in the said proceeding the appellant husband appeared but he neither disclosed the filing of Title Suit (Matrimonial) No. 219 of 2012 nor made any effort to disclose the respondent's address of Patna.

Having heard learned counsels for the parties, it appears that for proceeding ex parte in a suit, the Court exercises the jurisdiction under Order IX Rule 6(1)(a) of the Code, when the plaintiff appears and the defendant does not appear and the suit is called for hearing and if it is proved that the summons were duly served, the Court may make an order that the suit be heard ex-parte. Order IX Rule 6(1)(a) of the Code reads as follows:

“6. Procedure when only plaintiff appears.

—(1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then—

When summons duly served.

(a) if it is proved that the summons was duly served, the Court may make an order that the suit shall be heard ex parte;]



(b)....

(c)....”

The said jurisdiction has been exercised by the learned Principal Judge, Family Court but the same is not under challenge. What is under challenge is the exercise of jurisdiction under Order IX Rule 13 of the Code, which prescribes the procedure for setting aside the ex-parte decree against the defendant. Order IX Rule 13 of the Code reads as follows:

“13. Setting aside decree ex parte against defendant.—In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit: Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also: 1 [Provided further than 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.]”

For setting aside the ex-parte decree, the pre-condition for exercise of jurisdiction under Order IX Rule 13 of the Code is that the Court should be satisfied that the summons was not duly served and that the respondent was prevented by sufficient cause for not appearing when the suit was called for hearing.

Hence, the only question to be considered is whether the materials on record suggest that the Court was satisfied that the summons was not duly served, or that the respondent wife was prevented by sufficient cause for not appearing ?

It appears that in the Maintenance Case No. 115M of 2005 which is still pending, the respondent wife has given her Patna address. The appellant husband appeared in this case, examined himself as a witness, but he never disclosed this fact that the matrimonial case for dissolution of marriage is pending which was filed in 2012. Such non-disclosure, leads to the only conclusion that it was deliberate and intentional.

Surprisingly, despite both the matters were pending and being adjudicated by the same Court, i.e. the learned Principal



Judge, Family Court, Patna, but it escaped the attention of the learned court below that in one proceeding, the respondent's Patna address has been given whereas in the other Darbhanga address has been given. In one proceeding, i.e. maintenance proceeding, both the appellant husband and respondent wife are appearing but in the matrimonial case the wife was precluded from appearing due to non service of notice. The above facts suggest lack of bonafide on the part of the appellant.

In exercise of jurisdiction under Order IX Rule 13 of the Code for setting aside the ex parte decree passed against the respondent, the Court has to be satisfied that the summon was not duly served and the respondent was prevented by sufficient cause for not appearing when the suit was called, which has been held in the case of G.P. Srivastava Vs. R.K. Raizada and Ors, reported in (2000) 3 SCC 54. Paragraph 7 of the judgment reads as follows:

“7. Under Order 9 Rule 13 C.P.C. an ex-parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any 'sufficient cause' from appearing when the suit was called on for



hearing. Unless 'sufficient cause' is shown for non-appearance of the defendant in the case on the date of hearing, the Court has no power to set aside an ex-parte decree. The words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the court to do complete justice between the parties particularly when no negligence or inaction is imputable to erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as elastic expression for which no hard and fast guidelines can be prescribed. The courts have wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The 'sufficient cause' for non appearance refers to the date on which the absence was made a ground for proceeding ex-parte and cannot be stretched to rely upon other circumstances anterior in time. If 'sufficient cause' is made out for non appearance of the defendant on the date fixed for hearing when ex-parte proceedings initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where defendant approaches the Court immediately and within the statutory time specified, the discretion is normally exercised in his



favour, provided the absence was not malafide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits.”

This is not in dispute that the summons were never served upon the respondent wife. So far as substituted service of notice by publication in daily newspaper “Aaj” which has been brought on record as Annexure 1, is concerned, it appears that the said notice stipulated about Darbhanga address of the respondent but it was published in newspaper daily “Aaj” of Patna edition and hence on this score also, this Court is of the opinion that there was no valid service of notice.

So far as the contention of learned counsel with regard to stipulation of Article 123 of the Limitation Act is concerned, the same provides that for the purpose of computing limitation for setting aside the decree passed ex parte, the time for computing limitation shall began to run from the date of decree, or in cases where the summons or notice has not been duly served, then it shall be computed from the date when the applicant had the knowledge of the decree. It does not talk of substituted service of notice under Order V Rule 20 of the



code. Article 123 of the Limitation Act reads as follows:

	Description of the application	Period of limitation	Time from which period begins to run
123	To set aside a decree passed ex parte or to re-hear an appeal decreed or heard ex parte	Thirty days	The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree

From perusal of the averments made by the appellant husband in paragraph nos. 8 and 9 of the plaint of Matrimonial Case No. 219 of 2012, it appears that he had the knowledge that the respondent wife was staying at Patna and running a beauty parlour, which read as follows:

“8) यह कि ज्ञातव्य है कि प्रतिवादिनी उक्त वाद समाप्ति के बाद वादी के साथ पुनः दामपत्य जीवन निर्वाह करने जाने के क्रम में पटना अपनी बड़ी बहन (कपिलदेव राम जीजा) के यहाँ चली गयी और इस तरह वादी को अकेले बरेली जाना पड़ा।

9) यह कि ज्ञातव्य है कि प्रतिवादिनी पटना में अपने बहन व जीजा के यहाँ रहकर ब्यूटी पार्लर चलाकर अकेली जीवन निर्वाह करने लगी तथा बच्ची को भी अपने ही साथ रखने लगी। वहीं से प्रतिवादिनी पटना व मायके में जीवन बीताने लगी। ”

Hence, as per the own admission of the appellant, he is precluded from raising any objection for setting aside the ex parte judgment and decree.



The expression 'sufficient cause' appearing in Order IX Rule 13 has to be given a liberal construction for advancement of sustainable justice as has been held by the Hon'ble Supreme Court in the case of Bhivchandra Shankar More Vs. Balu Gangaram More and Ors., reported in (2019) 6 SCC 387. Paragraph 15 of the judgment reads as follows:

"15. It is a fairly well settled law that "sufficient cause" should be given liberal construction so as to advance sustainable justice when there is no inaction, no negligence nor want of bonafide could be imputable to the appellant. After referring to various judgments, in B. Madhuri, this Court held as under:-

"6. The expression "sufficient cause" used in Section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which serves the ends of justice. No hard-and-fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years courts have repeatedly observed that a liberal approach needs to be adopted in such matters so that



substantive rights of the parties are not defeated only on the ground of delay.”

The question of limitation has been raised in the Miscellaneous case, but once the Court issued notice pursuant to which, the appellant appeared and filed his reply and deposed as a witness, we do not think that the same can be raised at this stage. The rules of limitation are not meant to destroy the rights of the parties. Moreover, Article 123 of the Limitation Act prescribes limitation of one month for filing application for setting aside the ex parte decree within one month of the date of decree, but where the summons and notice were not served then in such circumstance the period of limitation has to be counted from the date of applicant having knowledge of the decree. The specific case of the respondent wife is that once she came to know about the ex parte decree, she challenged the same. The issue of limitation should be considered liberally for the advancement of justice has been candidly explained by the Hon’ble Supreme Court in the case of N. Balakrishnan Vs. M. Krishnamurthy, reported in (1998) 7 SCC 123. Paragraph 11 of the judgment reads as follows:

“11. Rules of limitation are not meant



to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae ut sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.”

In view of the discussions made above, we do not



find any merit in the present Miscellaneous Appeal. Hence, the same is dismissed.

(Dinesh Kumar Singh, J)

(Arvind Srivastava, J)

mcv/-Anil/

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