

HIGH COURT OF CHHATTISGARH, BILASPUR

FAM No.227 of 2017

Smt. Maya Soni W/o Rahul Soni, Aged About 35 Years at Present
House No. 540, Paliwal Compound, Near Hardol Temple Chhawani Kota
Rajasthan Through F/o Rupendra Sakywal S/o Late Chunnilal, R/o
House No. 540, Paliwal Compound, Near Hardol Temple Chhawani Kota
Rajasthan
----Appellant

Versus

Rahul Soni S/o Late Prabhashankar Soni, Aged About 33 Years R/o
Village Jairamnagar, Police Station Masturi, District Bilaspur,
Chhattisgarh
--- Respondent

For Appellant	:	Mr. Anand Kesharwani, Advocate
For Respondent	:	Mr. Anil Mourya, Advocate

DB : Hon'ble Shri Justice Manindra Mohan Shrivastava

Hon'ble Smt. Justice Vimla Singh Kapoor

Order on Board by Manindra Mohan Shrivastava, J.

17/12/2019

Heard.

1. This appeal is directed against impugned order dated 09.10.2017, by which, appellant's application under Order IX Rule 13 CPC for setting aside ex-parte judgment and decree dated 02.08.2016 has been rejected.
2. Marriage between the parties was solemnized on 10.03.2012. Later on, respondent/husband filed a suit No.82-A/15 before the Family Court at Bilaspur for grant of decree of divorce against the appellant. An ex-parte judgment and decree of divorce was passed in that case on 02.08.2016.
3. The appellant, herein, then moved an application under Order IX Rule 13 CPC for setting aside ex-parte judgment and decree against her mainly on the ground that she was never served with any summons of the case and this fact was not known to her that any such case has been filed therefore, she could not appear and ex-parte judgment and decree came to be passed. It was also stated by her that the factum of passing the ex-parte judgment and

decree came to her notice in the course of another proceeding pending before the Judicial Magistrate, First Class Kota, wherein, enquiry was being made with regard to the allegations of domestic violence.

4. The application was replied by the respondent stating that the Family Court had issued summons for being served on the appellant by registered post with acknowledgment due but the notice was returned along with endorsement of the postal officer that the appellant refused to receive notice. As required under the law in view of report of refusal to accept the notice, the learned Family Court, after necessary declaration as required under Order V Rule 9 CPC, proceeded ex-parte. It was submitted that the application for setting aside ex-parte judgment and decree was supported by an affidavit of the appellant. The Court below closely examined the records and taking into consideration that the version of the appellant regarding she having come to the notice and knowledge of the ex-parte judgment and decree does not appear to be reliable and further that in the Civil Suit, the summons sent through registered post with acknowledgment due returned with endorsement of the postal officer regarding refusal of service of notice, rightly rejected the application.

5. We have heard learned counsel for the parties and perused the records.

6. Present is a case where the respondent has been granted a decree of divorce against the appellant wife in ex-parte proceeding. The wife, in her application for setting aside ex-parte decree as also in her affidavit under Order XVIII Rule 4 CPC, has very clearly stated that no summons was ever served upon her and she had no notice and knowledge of the pendency of the proceeding of divorce and this fact came to her notice and knowledge only later on, during the course of another proceedings pending in the Court of Judicial Magistrate, First Class Kota on the allegation of domestic violence made by the appellant against respondent/husband.

7. We have gone through the order-sheets and proceedings of the Court below and also impugned order. We find that the learned Court below has committed serious illegality in the matter.

8. Firstly, we find that the ex-parte judgment and decree was passed by the Principal Judge, Family Court, Bilaspur in Civil Suit No.82-A/15. After an

application for setting aside ex-parte decree was filed before the Principal Judge, the Principal Judge later on, vide order dated 18.05.2017 transferred the case to Additional Principal Judge ignoring the provision contained in Order IX Rule 13 CPC. Order IX Rule 13 CPC clearly ordains that in any case where ex-parte judgment and decree passed, the aggrieved party may apply to the Court by which the decree was passed, for an order to set it aside. That means, the application for setting aside ex-parte decree is to be considered and decided by the Court which passed the ex-parte decree. The transfer of the case by the Principal Judge to the Additional Principal Judge seems to be in exercise of its general power of distribution of business of the Court conferred under Section 4(2)(c) of the Family Courts Act, 1984. The provisions relating to distribution of the business of the Court among various judges constituting Family Court is subject to the legal requirement as embodied in Order IX Rule 13 CPC that the application for setting aside ex-parte decree has to be considered and decided only by the Court which passed the decree.

9. We also find that after the appellant submitted application under Order IX Rule 13 CPC, she had also filed her affidavit under Order XVIII Rule 4 CPC. She appeared in the proceeding and the dates on which, she could not appear, she was duly represented by her agent. The respondent also submitted his affidavit under Order XVIII Rule 4 CPC. By that time, the examination of the appellant had not taken place nor any opportunity was given to the other party to cross-examine the appellant. When the case was listed on 09.10.2017, both the parties were present even though, the learned Family Court without allowing the parties to cross examine witness, straightway proceeded to pass the order. The impugned order records that the parties have not cross-examined witnesses. There was no occasion for the parties to examine witnesses because the learned Family Court straightway proceeded to pass the order. It is thus seen that the order is not only without jurisdiction but also suffered from gross illegality and therefore cannot be sustained in law.

10. Learned counsel for the respondent has placed reliance upon decision of the Supreme Court in the case of **Parimal Vs. Veena @ Bharti, 2011(3) SCC 545**. There is no quarrel with the settled legal position that where a party alleges that service was not effected, the burden lies on him and there will be presumption of service of notice. However, in the present case, no enquiry has been held in that regard nor the parties have been allowed to lead their oral

and documentary evidence. Despite parties having filed their respective affidavit under Order XVIII Rule 4 CPC, learned Family Court has straightway proceeded to pass judgment in the case.

11. In the result, impugned order is set aside and the matter is remanded back to the Principal Family Court, Bilaspur to decide the application under Order IX Rule 13 CPC after affording both the parties full opportunity to lead oral and documentary evidence with regard to the aspect of service of notice on the appellant.

12. Records of the Court below in Civil Suit No.82-A/2015 along with records of MJC No.10/2017 be remitted forthwith.

13. The parties shall appear before the Family Court, Bilaspur on 10th of February, 2020.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Vimla Singh Kapoor)
Judge