

HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

CIVIL REVISION PETITION No.6453 of 2018

ORDER:

This Revision is filed by the petitioner under Article 227 of the Constitution of India challenging the order dt.30-08-2018 in I.A.No.608 of 2016 in O.P.No.816 of 2013 of the Family Court at Hyderabad setting aside the *ex parte* decree passed on 25-10-2013 in the said O.P. against the respondent by dissolving her marriage with the petitioner.

2. The petitioner in this Revision had earlier been married to the respondent on 04-05-2007. Later disputes arose between them and respondent filed the subject O.P. alleging cruelty against petitioner.

3. It appears that summons were sent through Process Server for service on respondent, but the Process Server filed a report on 06-08-2013 stating that respondent refused to receive the notice and so he affixed it to the main door.

4. Notice sent by RPAD to the address shown in the O.P. as that of the respondent was returned as “unclaimed”.

5. Treating the summons and notice sent through Registered Post as having been served, the Family Court set the respondent *ex parte* and passed the *ex parte* decree on 25-10-2013.

6. The respondent then filed on 03-06-2016 I.A.No.608 of 2016 under Order IX Rule 13 C.P.C. to set aside the *ex parte* decree dt.25-10-2013 in F.C.O.P.No.816 of 2013

7. In the affidavit filed in support of the said application, she stated that petitioner had shown wrong address of respondent, that the parties had been living together at H.No.18-7-466/2/B/113/A, Ambica Nagar, Uppuguda, Hyderabad, but the address was wrongly shown as H.No.18-7-455/279/A, Lalithabagh, outside Goulipura, Hyderabad, which is the address of her parents; that since their marriage itself was against the will of her parents, she was not informed by her parents; and thus by playing fraud on the Family Court, the *ex parte* decree was obtained by petitioner. She specifically alleged that there was collusion between the petitioner and the Process Server and so the Court while setting her *ex parte* in 2013 could not rely upon the report of the Process Server. She contended that she came to know about these proceedings only on 10-05-2016 and her application filed on 03-06-2016 is within 30 days from the date of knowledge of the same and therefore it is within time.

8. Counter was filed by petitioner opposing the said application. He contended that the address being now shown by respondent as her correct address was in fact the wrong address; that respondent intentionally remained *ex parte* and refused notices in the O.P. and respondent was rightly set *ex parte* and *ex parte* decree was passed. He also contended that respondent was aware about the grant of

divorce by the Family Court and certified copies of the *ex parte* divorce decree was given to her long back and so she was aware of the passing of the divorce decree.

9. He contended he had waited for 3 years and after appeal time was over, he had married one Smt.D.Shilpa on 01-05-2016 and the said marriage is also a registered marriage. He contended that only to avoid filing of a petition for condonation of delay under Section 5 of the Limitation Act, 1963, the respondent is claiming that she got knowledge of passing of the decree of 2013 in May, 2016 and that her contentions cannot be accepted. He denied the other allegations made by respondent also.

10. By order dt.30-08-2018, the Court below allowed I.A.No.608 of 2016 subject to payment of Rs.1,000/- as costs. After referring to the contentions of both sides, the Court below recorded that the docket proceedings coupled with endorsement of the Process Server on the notice and his sworn affidavit discloses that respondent was present in the house and she had refused to receive the summons and so he affixed the notice on the door of the house. It also recorded that the petitioner identified the respondent. It held that under Order V Rule 17 and 18 C.P.C., the Process Server is required to submit a report of service, the time and manner in which summons were served, name and address of the person who identified the person served and witnessing of delivery tendering the summons, but the report of the Process Server did not disclose that the Process Server had obtained

the signature and furnished the name and address of the witness in whose presence the petitioner has refused to receive the summons. It also observed that the petitioner had not chosen to examine the Postman who made endorsement on postal cover sent by RPAD as “unclaimed”, and the Family Court, before granting the *ex parte* decree, could have taken steps to summon the Postman or ordered for service by substituted service.

11. It therefore held that valuable rights regarding matrimonial status are involved in the O.P. and since the respondent was not served with notice personally on the address mentioned in the O.P. and the Process Server did not act in accordance with Order V Rules 17 and 18 C.P.C., and the petitioner did not examine the Postman who made the endorsement on the postal cover as “unclaimed”, opportunity ought to be given to the respondent to seek adjudication of the case on merits rather than suffering *ex parte* decree. It also opined that the marriage of the petitioner after the *ex parte* was passed is of no consequence and cannot be a factor to deny opportunity to the respondent to contest O.P. on merits. It also held that application to set aside *ex parte* decree can be entertained even without filing application for condonation of delay since respondent had not been served notice in the O.P. personally and she came to know of the same through Chatrinaka Police when the police approached her in connection with the investigation of a crime registered on her complaint and so I.A. under Order IX Rule 13 C.P.C. was filed within the period of limitation.

12. Assailing the same, this Revision is filed.
13. Heard Sri A.Prabhakar Rao, learned counsel for petitioner and Sri Y.Koteswara Rao, learned counsel for respondent.
14. Learned counsel for petitioner contended that the Court below had erred in allowing the application under IX Rule 13 C.P.C. filed by respondent and that respondent had deliberately refused to receive the summons in O.P. and had remained *ex parte*. He also contended the Family Court had wrongly placed the burden on petitioner to examine the Process Server and Postman to prove proper service of summons, and in any event, 3 years after the *ex parte* decree is passed and after the petitioner had remarried, the Court below could not have allowed the I.A.
15. Learned counsel for respondent refuted the above contentions and supported the orders passed by the Court below.
16. Order V Rule 17 C.P.C. requires that if a defendant/respondent refuses to accept service, Process Server has to not only affix the copy of the summons on the outer doors or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, but shall also 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.

17. Order V Rule 18 further requires that the Process Server in all cases in which the summons has been served under Rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

18. In the instant case, since the case of the petitioner is that respondent refused to accept the service, the report of the Process Server should have specifically mentioned the name and address of the person by whom the house of the respondent was identified and in whose presence the copy was affixed. Admittedly, the report of the Process Server did not contain this. Thus, the report of the Process Server could not have been the basis for the Court below to make the respondent *ex parte* and pass *ex parte* decree.

19. As regards the service of summons by registered post, no doubt in the instant case, the postal cover is said to have been returned with an endorsement “unclaimed”. But it was incumbent on the part of the petitioner to examine the Postman who made such endorsement to prove it, but he did not choose to do so. The Family Court also, before passing *ex parte* decree, did not take steps to summon the Postman nor did it direct service on respondent by substituted service.

20. Thus, the respondent had not been duly served with notice personally and suffered an *ex parte* decree. Since respondent cannot

be allowed to suffer for the fault of the Family Court in not properly following Order V Rule 17 C.P.C. or in not summoning the Postman, and since valuable rights regarding matrimonial status of the parties are subject matter of the O.P., I hold that Court below did not commit any error in allowing I.A.No.608 of 2016 after awarding costs to the petitioner.

21. Also, the Court below was right in holding that application under Section 5 of the Limitation Act, 1963 for condonation of delay was not necessary since the said I.A. was filed within 30 days from the date of knowledge of the same.

22. Therefore, I see no merit in the Revision and it is accordingly dismissed. No costs.

23. As a sequel, the miscellaneous petitions, if any pending, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 28-01-2019
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