

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **MAT.APP.(F.C.) 57/2017**

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Reserved on: 20.08.2019  
Date of decision: 03.09.2019

RITU

.....Appellant

Through Mr. S.S. Panwar, Advocate

versus

SANDEEP KUMAR PRASHAR

..... Respondent

Through Mr. Navin Kumar Chaudhary,  
Advocate

**CORAM:**

**HON'BLE MS. JUSTICE HIMA KOHLI**

**HON'BLE MS. JUSTICE ASHA MENON**

**ASHA MENON, J.**

1. The appellant/respondent is aggrieved by the order dated 23.01.2017, passed by the Family Court, Central District, Delhi dismissing her application under Order 9 Rule 13 read with Section 151 CPC, for setting aside of the ex-parte judgment and decree of Judicial Separation dated 03.11.2007, passed in favour of the respondent/petitioner.

2. The facts as are relevant for the disposal of the present appeal, as made out from the record, are that on 10.12.2005, the marriage between the parties was solemnized at Delhi according to Hindu rites and ceremonies. According to the appellant/respondent, on 07.10.2006, she was subjected to cruelty and torture as a result of which, though she was pregnant, she was forced to leave the matrimonial home and reside with her parents. On

01.04.2007, a son was born to the parties who was suffering from a congenital heart ailment (hole in the heart).

3. The respondent/petitioner filed a petition under Section 10 of the Hindu Marriage Act, 1955 (for short, the 'Act') on 19.05.2007 seeking Judicial Separation from his wife. The appellant/respondent was proceeded *ex-parte* in the said proceedings as she was deemed to have been duly served on refusal of the summons by her and her father. Resultantly, the learned Trial Court granted a decree of Judicial Separation vide judgment dated 03.11.2007. Subsequently, the respondent/petitioner filed for divorce on 06.11.2008, under Section 13(1) (i-a), (i-b) and 13 (1-A) of the Act, on the grounds of cruelty, desertion as well as non cohabitation by the parties after the grant of a decree of Judicial Separation, which is pending adjudication.

4. According to the appellant/respondent, she learnt about the *ex-parte* decree dated 03.11.2007, only on 31.01.2009 and took immediate steps to file an application under Order 9 Rule 13 read with Section 151 CPC on 19.02.2009, for setting the said decree aside. She also filed a complaint case under Section 12 of the Protection of Women from Domestic Violence Act, 2005 against the respondent/petitioner and his family members on 21.02.2009. On 01.04.2009, she filed a complaint before the CAW Cell against the respondent and his family members and an FIR No. 86/2009 under Sections 489A, 406 read with Section 34 of the IPC dated 01.04.2009 was registered at PS Shahbad Dairy, Delhi, which is still pending.

5. In the application filed on behalf of the appellant/respondent under Order 9 Rule 13 read with Section 151 CPC, she claimed that she had never been served. It was alleged that the respondent/petitioner in collusion with the process server and the Postal Authorities, had manipulated the refusal

reports since she had to be constantly hospitalized and was sick on account of the torture meted out by the respondent and his family, which had driven her to leave the matrimonial home in the first place, on 07.10.2006.

6. The appellant/respondent also contended that the petition for Judicial Separation was a frivolous one as the respondent/petitioner, his brother and other family members had subjected her to torture despite her state of health and pregnancy and their conduct had compelled her father to come and take her away from the matrimonial home on 07.10.2006. It is also submitted that the child born to the parties is a sick child but the respondent/petitioner had failed to discharge his obligations towards the child or give maintenance to her or the child. In this background, the appellant/respondent prayed that the *ex-parte* judgment and decree dated 03.11.2007 be set aside.

7. A reply in opposition to the application was filed by the respondent/petitioner wherein it was contended that the same was time barred. It was averred that the appellant/respondent had been duly served and was rightly proceeded against *ex-parte* on 25.08.2007 and that the application had been filed with the malafide intention of causing maximum harassment to the respondent/petitioner. It was submitted that the appellant/respondent had deliberately and wilfully not appeared before the Court despite due service and, therefore, the application ought to be dismissed with heavy costs. The appellant/respondent filed a rejoinder to the reply, reiterating her stand as taken in the application.

8. Records reveal that the Family Court granted an opportunity to the appellant/respondent to lead evidence to substantiate her claim that she had not been duly served in the petition. The appellant/respondent examined herself as AW1 and her father, Mr. Ram Kumar Kaushik as AW2, while the

respondent/petitioner examined himself as RW1.

9. Upon consideration of the evidence that came on the record vide the impugned order dated 23.01.2017, the Family Court held that though service of the summons through the process server may not be valid but the appellant/respondent was definitely served through registered post, which she had refused to accept and having been validly served, chose not to contest the petition. It also observed that the application moved by the appellant/respondent was time barred and the same was dismissed.

10. The above order of the Family Court has been challenged before us *inter alia* on the grounds that there was no basis for the Court to have arrived at a conclusion that the application filed by the appellant/respondent was time barred. Secondly, it has been stated that when the postman was not examined by the respondent/petitioner, the word of the appellant/respondent regarding non-service had to be accepted as true and correct.

11. Learned counsel for the appellant, Mr. S.S. Panwar has tried to convince us that the Family Court had fallen into error in dismissing the application under Order 9 Rule 13 CPC by pointing out that the observations made in the impugned order that the appellant/respondent had information of the ex-parte divorce granted on 18.11.2008, was based on no evidence and the said conclusion was liable to be set aside. Learned counsel also drew our attention to the order-sheets placed on the record to submit that the petition was filed by the respondent only on 21.05.2007 and on the third date of hearing, the appellant/respondent was proceeded against ex-parte on the ground that summons had been refused, when the said summons had been ordered to be served through registered post as well as through the process server. According to the learned counsel for the appellant/respondent, the

Trial Court ought to have adjourned the matter and directed the respondent/petitioner to take fresh steps to serve the appellant/respondent including by way of dasti process before proceeding against her *ex-parte*.

12. We do not find any force in the above contention. No rule requires the Court to direct dasti service of summons on receipt of a report of refusal of the process. Rather, had the summons been taken dasti by the respondent/petitioner and a report of refusal recorded, such a report could have raised a suspicion.

13. The Trial Court dealing with the petition seeking the relief of Judicial Separation had noted in its judgment dated 03.11.2007, that the notice of the petition issued by ordinary process was refused by the father of the appellant/respondent. It was also noted that the summons despatched by registered cover was refused by the addressee i.e. the appellant/respondent herself and the said refusal on her part to accept service of the notice, was deemed to be an effective service upon her. For ready reference, the observations made by the Family Court are reproduced below:-

*“Notice of the petition was issued to the respondent by ordinary process as well as through registered cover for 29.08.2007 and the registered cover was received back with the report that the addressee/respondent refused to accept the service of the notice. Notice sent by ordinary process was also received back with the report that father of the respondent was met who refused to accept the service. The said refusal of the respondent to accept the service of the notice was deemed to be an effective service upon the respondent, who was awaited on 29.8.2007 till 2.15 p.m. Whereafter the respondent was proceeded exparte.”*

14. The observation of the Family Court while dealing with the

application filed by the appellant/respondent under Order 9 Rule 13 CPC to the effect that the process server had not followed the mandatory provisions of Order 5 Rule 17 CPC, would not strengthen the case of the appellant/respondent as in the impugned order, the Family Court has elected to place reliance upon the report of the postman who has recorded that the appellant/respondent refused to receive the postal article and not on the report of the process server. Refusal to receive the summons must be treated as due service.

15. Relying on the judgment of the Supreme Court in **A. Rama Rao and Others vs. Raghu Nath Patnaik and Others** (2007) 9 SCC 521, the learned counsel for the appellant/respondent has contended that the postman had not been examined by the Family Court and, therefore, no reliance on the endorsement on the article despatched by registered post could be placed to conclude that the appellant/respondent had been duly served and that the onus was on the respondent/petitioner to prove that the postal article was refused by examining the postman and in any case, the testimony of the appellant/respondent would have to be believed over the postal remarks. The decision in **A. Rama Rao and Others (supra)** can be distinguished on facts as it relates to a case of specific performance and the question that came up for consideration before the Court was whether the defendant in that case had knowledge about the existence of an agreement dated 07.01.1983, predating the execution of the Sale Deed/Agreement to Sell dated 14.03.1984. In that case, since the plaintiff claimed to have sent a notice, which was returned with the report of refusal, it was held by the Supreme Court that the statement of the defendant no. 1 on oath that he had not received the notice allegedly sent by post, should be accepted over the postal

remarks of “refused”, unless the postman was examined.

16. In the present case, it is the appellant/respondent who has asserted that she had not refused the process and in her testimony, claimed that no registered cover was ever served on her which she had refused to accept. Her explanation was that she was ill and was visiting the hospital from time to time and being unavailable at home, could have had no opportunity or occasion to refuse the process of the Court. Unfortunately, the evidence produced by the appellant/respondent does not establish such a case. In her cross-examination, she admitted to the fact that she had remained in the hospital only for 5 days, from 01.04.2007 to 05.04.2007 whereas the processes were issued subsequently, in the months of May, July and August, 2007. It may also be noted that during the cross-examination of the respondent/petitioner, examined as RW1, he had stated *“I did not go along with the process server for effecting the service of the main petition. I came to know about the refusal of the summons by the appellant/wife through the Court file only”*. It is clear from the above that the respondent/petitioner did not have any hand in the recording of the refusal report by the postman. The Family Court rightly concluded that there was no reason for the postman to have made a false endorsement and there is no evidence of any such manipulation.

17. The Family Court also recorded that the address mentioned on the registered post was the correct address of the appellant/respondent, as an earlier legal notice (Ex.PW1/1), had been duly served on her at that address. In any case, such a plea was not even taken before us that the address given on the article, was erroneous. The address being the correct address, the Family Court has rightly drawn a presumption of deemed service as

contemplated in Section 27 of the General Clauses Act, 1897, to conclude that the appellant/respondent was duly served and had failed to contest the petition.

18. For the aforesaid reasons, we do not find any error in the impugned order calling for interference. The appeal is accordingly dismissed being devoid of merit.

19. No orders as to costs.

**(ASHA MENON)**  
**JUDGE**

**(HIMA KOHLI)**  
**JUDGE**

**SEPTEMBER 03, 2019**  
MK/s