

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 08.09.2020	Delivered on 16.09.2020
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CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.R.P(NPD)No. 3603 of 2018
and
C.M.P.No. 20146 of 2018

V.Nalini ...Petitioner/Respondent

Vs.

M.Sastri ... Respondent/Petitioner

Prayer: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, against the fair and decreetal order of the 5th Additional Family Judge at Chennai, dated 03.01.2018 in I.A.No. 928 of 2016 in O.P.No. 4606 of 2010.

For Petitioner : Mr. Abdul Rehman for
M/s. Nathan and Associates

For Respondent : Mr.G.RM.Palaniappan

O R D E R

This civil revision petition is by the respondent/wife, whose application for condonation of delay of 979 days in seeking to set aside the exparte decree passed in H.M.O.P.No. 4606 of 2010 was dismissed by the Family Court.

2. The main petition namely, the petition for divorce was launched under Section 13 (1)(i)(a) of the Hindu Marriage Act by the husband seeking divorce. An exparte decree came to be passed on 08.02.2012. There were proceedings against the husband under the Domestic Violence Act and for maintenance in M.C.No. 8 of 2011 on the file of the Judicial Magistrate, Thivaiyaru. An interim order of maintenance came to be passed in M.C.No. 8 of 2011 on 13.01.2015.

3. The petitioner/wife filed an instant application in I.A.No. 928 of 2016 seeking condonation of delay claiming that she was not properly served in the HMOP and that she came to know about the exparte decree for divorce only just prior to the filing of the instant application in October 2014. The said

application was opposed by the husband contending that there was proper service on her and she has not shown sufficient cause for condonation of delay. Since there was a serious dispute regarding the manner and the date on which she was served in the HMOP, I have called for the records from the Family Court.

4. A perusal of the records sent by the Family Court shows that there is no evidence of service of notice through Court. An acknowledgment card has been produced by the husband to show that the wife has received some letter sent by him on 11.05.2011. The said acknowledgment is not supported by an affidavit of service and there is no order for service privately. The process form does not have any endorsement of service through Court. The learned Family Judge had concluded that the petitioner has been served on 11.05.2011 and as such she has not explained the delay properly.

5. I have heard Mr.Abdul Rehman for M/s. Nathan and Associates, learned counsel for the petitioner and Mr. G.RM.Palaniappan, learned counsel for the respondent.

6. Mr.Abdul Rehman would vehemently contend that there was no proper service in the OP on the petitioner. As already pointed out, the acknowledgment card, which has been treated as evidence of proper service by the Family Court is not supported by an affidavit of service. It is not known, what was sent under cover of the said acknowledgment. There is no order for private notice on the said date.

7. A perusal of the notes paper shows that the notice was ordered in the OP returnable by 28.02.2011. On 28.02.2011, fresh notice was ordered returnable by 25.04.2011. On 25.04.2011, again fresh notice was ordered returnable by 21.06.2011. On 21.06.2011, the learned Family Judge has made the following endorsement: "Petitioner absent. Steps not taken through Court. Time extended till 23.07.2011." On 23.07.2011, the learned family Judge has recorded as follows: "Petitioner present. Await Notice. Post on 13.08.2011." On 13.08.2011, the following endorsement has been made:- "Petitioner present. AOS filed along with the acknowledgment. For appearance of the respondent, 10.09.2011". On 10.09.2011 the following endorsement is made by the learned Family Judge, "Petitioner present. Respondent absent. Appearance of the respondent, 08.10.2011." Again on 08.10.2011, the OP was adjourned for appearance of the respondent on 10.11.2011.

8. On 10.11.2011, the respondent was called absent and set exparte and finally, the exparte decree was passed on 08.02.2012. The above facts culled out from the records would show that the service on the respondent was not sufficient

service. It is seen from the records that the acknowledgment card which has been filed showing that the petitioner was served with some notice on 11.05.2011 is not supported by an affidavit of service. It is not known as to what was the enclosure that was sent under cover of the said acknowledgment. I am therefore, unable to sustain the conclusion of the learned Family Judge that there was proper service on the petitioner in the OP. Hence, in the absence of proper service in the OP, the learned Family Judge was not right in refusing to condone the delay more so, when the matter involves the status of the petitioner and the original proceeding is one for divorce. I am therefore, of the considered opinion that the petitioner should be given an opportunity to contest the OP on merits.

9. In view of the above, this civil revision petition is allowed, the delay of 979 days in filing the application to set aside the exparte decree for divorce is allowed, the family Court is directed to number the application filed under Order IX Rule 13 of C.P.C and proceed with it in accordance with law.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

kkn

To

The Judge,

5th Additional Family Court,
Chennai.

+1 cc to M/s.Nathan and Associates , Advocate Sr.No. 30585

+1 cc to M/s.G.RM.Palaniappan, Advocate Sr.No. 30155

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SAI (CO)

RMP(10/11/2020)

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