

In the High Court of Punjab and Haryana at Chandigarh

FAO-5922 of 2011 (O&M)

Date of Decision:17.2.2020

Jaswinder Kaur

---Appellant

vs.

Kulbir Singh

---Respondent

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr.Vikas Bahl, Senior Advocate with
Mr. Dhruv Walia, Advocate
for the appellant
Mr. R.S.Athwal, Advocate
for the respondent

Rekha Mittal, J.

Jaswinder Kaur and Kulbir Singh performed marriage in the year 2003 and out of wed lock, two children were born who are in custody of their mother. Kulbir Singh filed petition under Section 13 of the Hindu Marriage Act, 1955 (in short “the Act”) seeking decree of divorce. The proceedings culminated in ex parte judgment and decree dated 4.3.2008 in divorce petition filed on 22.10.2007. She was proceeded against ex parte on the basis of report prepared by process server of the court that she refused to accept summons and one copy of summons was affixed at 'dare abad'.

Jaswinder Kaur filed application for setting aside ex parte judgment and decree by invoking Order 9 Rule 13 of the Code of Civil Procedure, 1908 (in short “the Code”) raising averments that she was never served in the case. Report of refusal was manipulated by her husband in

connivance with the process serving agency. It is further averred that on 19.10.2009, a telephonic message was received by her family that Kulbir Singh had married and some party was going on in his house. The respondent-husband is enjoying benefits of his own wrong who has not bothered about future of minor children. He manipulated the report on summons to get a fraudulent ex parte decree by playing fraud with the court.

The respondent filed reply to the application denying the allegations on the basis whereof the appellant sought indulgence of the Court for setting aside ex parte decree dated 4.3.2008. It is averred that decree was passed on 4.3.2008 and marriage with Minakshi Sharma was solemnized on 12.10.2009 which was registered on 14.10.2009. Jaswinder Kaur did not adjust in the matrimonial house. She used to compel the respondent for separate residence. She left company of husband in March 2005 and she was in the habit of filing false applications.

The trial court framed issues for determination, read thus:-

1. Whether there are just and sufficient grounds for setting aside the ex parte judgment and decree dated 4.3.2008? OPA
2. Whether the application is within time? OPA
3. Whether the application has become infructuous in view of the preliminary objection No. 2 taken in the reply? OPR
4. Relief

The appellant appeared in the witness box and reiterated her story narrated in the application for setting aside ex parte decree. She

produced documents, in view of statement of her counsel recorded on 16.11.2010. In rebuttal, the appellant again tendered certain documents in evidence in view of statement of counsel dated 12.5.2011.

The trial court, determined issues No. 1 to 3, taken up jointly, against the appellant and resultantly the application was dismissed with costs. Feeling aggrieved, the present appeal has been filed by Jaswinder Kaur.

Counsel for the appellant would argue that before filing divorce petition, the respondent filed petition under Section 9 of the Act in which the appellant joined proceedings. As the matter was compromised between the parties, the petition was dismissed as withdrawn vide order dated 16.5.2006. The respondent filed another petition under Section 9 of the Act but the matter was again compromised between the parties and the petition was withdrawn in the Lok Adalat vide order dated 15.9.2007 Ex. PA/4. It is argued with vehemence that if the appellant caused appearance in the aforesaid two petitions, there was no reason for her to remain absent from the proceedings for divorce had she received any summons from the court. It is further argued that it is difficult to accept to reason that a person would shy away from the proceedings pending in a court of law at the risk of suffering ex parte order and thereafter knock at the door of the court to set aside that ex parte order. It is vehemently argued that the appellant never received any notice of divorce petition nor she had knowledge of pendency of divorce petition, therefore, she had been made to suffer a decree of divorce without an opportunity of being heard. It is further argued that the moment the appellant learnt about marriage of Kulbir Singh on the

basis of telephonic information received by her family on 19.10.2009, the instant application was filed on 23.10.2010. It is further argued that the two judgments relied upon by the Court **Parimal vs. Veena @ Bharti, 2011 (2) RCR (Civil)155** and **Babita Laul vs. Vijay Laul, 2010(1) RCR 449** cannot be applied to the case at hand because in the instant case, there is no service much less due service. The last submission made by counsel is that in case the ex parte decree of divorce is allowed to sustain merely because Kulbir Singh is married and has family from second wedlock, it may be of serious consequence for destitute wife who is left in lurch with responsibility to look after two children born out of wedlock. In support of his contention, he has relied upon judgment of this Court **Ram Rattan vs. Sunita Kumari alias Pinki 2011 (2) RCR (Civil) 897** wherein there is reference to judgment in **Babita Laul's case (supra)**.

Counsel representing the respondent, on the contrary, would argue that report prepared by an official of the court in respect of refusal of summons invites primacy viz-a-viz version of the appellant that summons were not tendered to her or she did not refuse to accept notice. It is further argued that respondent-husband filed petition for restitution of conjugal rights on aforesaid two occasions, sufficient to show that he wanted to rehabilitate the appellant-wife in matrimonial home but the appellant did not bother to resume cohabitation. It is further argued that second petition for restitution of conjugal rights was dismissed in the year 2007 and there is nothing on record suggestive of the fact if any steps were taken by the appellant-wife to resume conjugal relationship. In addition, it is argued that Kulbir Singh performed marriage with Minakshi Sharma and out of that

wedlock, there are two children and all of them are living in Germany. It is argued that in case the decree of divorce is set aside, it would be of serious consequence for Minakshi Sharma and children born out of wedlock without any fault attributable to them. Counsel would inform that Kulbir Singh is regularly paying maintenance to the children, assessed by the Court who was also ready to compensate the appellant in monetary terms for which she did not agree. Counsel has strongly supported the impugned order by referring to the judgments relied upon by the Court below.

I have heard counsel for the parties, perused the paper book, records of HMA No. 149 of 22.10.2007 decided on 4.3.2008 and Misc. application No. 23/23.10.2010 decided on 6.6.2011.

The first question that falls for consideration is, whether the appellant was duly served in divorce proceedings, in view of report of refusal and affixation prepared by a process server of the Court.

The trial court has not recorded any findings that the appellant was duly served in the divorce case. Perusal of the records would reveal that petition for divorce was registered on 22.10.2007. Notice to the respondent therein was ordered to be issued for 11.1.2008 on filing of process fee/RC/AD/copies etc. On the adjourned date, a report was received on the summons sent through ordinary process at the address "Jaswinder Kaur w/o Kulvir Singh D/o Balbir Singh R/o vill. Durgapur tehsil & Distt. Nawanshahr" that Jaswinder Kaur was found at the given place but she refused to accept service. A copy of summons was affixed at 'dare abad'. The date beneath signatures of process server is 11.16.2007. There is also a note that nobody was prepared to become a witness.

On the basis of aforesaid report, the trial court passed the following order:-

“As per report of process server, respondent-Jaswinder Kaur has refused to accept the summons. In these circumstances, respondent is proceeded against ex parte. The matter, as such, is adjourned to 4.3.2008 for exparte evidence of the petitioner.”

On the adjourned date, the respondent examined three witnesses, closed his ex parte evidence and the petition was allowed.

The Presiding Officer did not bother to examine that respondent had not complied with order dated 22.10.2007 by filing RC/AD/copies etc. Perusal of the summons issued through ordinary process makes it evident that no copy of the petition was appended with the summons and for that reason, no copy of the petition was affixed when a copy of summons is reported to have been affixed at the spot. The officer concerned was absolutely insensitive that in a divorce petition filed by the husband, on the summon issued for the first time, there is a report of refusal and affixation and report has not been attested by a witness of the locality much less chowkidar or other respectable of the village.

Krishan Kumar, process server, was not examined by the respondent to prove as to how he came to know about house of Jaswinder Kaur and established her identity to ensure that he had tendered summons to the right person. Keeping in view the aforesaid, it can safely be held that the manner in which the service is effected by way of refusal and affixation, by no stretch of imagination, can be treated as due service. This apart, if the

appellant could appear in the cases filed for restitution of conjugal rights, there was no reason for her to stay away from divorce proceedings had she been served particularly in the circumstances that there are two children out of wedlock of the parties, staying with the appellant wife. The trial court, without examining these vital aspects of the matter, had proceeded to decide the matter in a very casual and perfunctory manner, on the basis of conjectures and surmises as if it was hell bent to put a seal on ex parte decree of divorce. The trial court dismissed the application on the following grounds viz:-

- (i) The appellant-applicant had the notice of divorce petition.
- (ii) Filing of two petitions under Section 9 of the Act and dismissed as withdrawn on 16.5.2006 and 15.9.2007 supports case of the respondent that Jaswinder Kaur was residing separate from him against his wish and without any just and sufficient cause. It rather shows that Kulvir Singh tried to rehabilitate the appellant twice but the appellant did not join the respondent.
- (iii) The respondent filed the divorce petition as the appellant did not join his company despite his having filed two petitions under Section 9 of the Act. Notice of divorce petition was given but she refused to accept the service. She was proceeded ex parte and decree of divorce was passed on 4.3.2008. Even thereafter, she did not contact the respondent and filed the present application after second marriage of respondent with Minakshi Sharma to pressurize and harass

the respondent.

(vi)The respondent performed marriage with Minakshi Sharma after expiry of period of limitation for filing appeal against ex parte judgment and decree. The appeal has been rendered infructuous. For this, reliance has been placed on **Parimal's case (supra)** and **Babita Laul's case (supra)**.

The appellant appeared in the witness box and reiterated her tale of woe with regard to dissolution of her marriage at her back on the basis of ex parte decree of divorce obtained by her husband. Counsel for the appellant has failed to point out any materials on record from which it can be inferred that the appellant had knowledge of pendency of divorce proceedings or passing of ex parte decree at any time prior to 19.10.2009. Nothing was put to the witness as to whether the parties resumed cohabitation after decision of petitions for resumption of conjugal rights, as withdrawn on the basis of compromise or what happened thereafter. The respondent-husband did not appear in the witness box to say something that he made any efforts to bring the appellant back to the matrimonial home at any point of time after decision of petitions under Section 9 of the Act. In the given scenario, the appellant can not be blamed for failure of the parties to live together. The mere fact that the husband filed the petitions under Section 9 of the Act ipso facto is not an evidence that the wife was staying away without any reasonable cause or husband was really interested to resume cohabitation. The matter would have been different, had the

petition(s) under Section 9 of the Act been decided on merits. Similarly, the appellant was not asked to explain if she was in touch with the respondent during pendency of divorce case or thereafter. In this view of the matter, it can safely be held that observations made by the trial court, noticed hereinbefore, are based upon surmises, conjectures and inferences and not upon any material on record. As a matter of fact, the appellant was neither served much less duly served nor she had knowledge of divorce proceedings or ex parte decree at any point of time prior to 19.10.2009. As has been noticed hereinbefore, but for the sake of repetition, the trial court tried to find one way or the other to dismiss the application. I stand fortified in my observation from the fact that the trial court shirked from appreciating the issue of due service, in view of materials on record and even sought support from judgment in **Parimal's case (supra)** without noticing that repeated efforts were made in that case to serve the wife whereas in the present case, she was proceeded ex parte on the basis of report of refusal on the summons sent for the first time through ordinary process and there was neither compliance of order dated 22.10.2007 passed in divorce case, noticed hereinbefore nor of Rule 2 of Order 5 of the Code.

This brings the court to findings of the trial court on issue No. 3 with regard to the application having become infructuous, in view of preliminary objection No. 2 taken in the reply namely Kulbir Singh had performed marriage with Minakshi Sharma on 12.10.2009 registered on

14.10.2009.

The trial court had relied upon judgment of Hon'ble the Supreme Court **Parimal's case (supra)** and of this Court **Babita Laul's case (supra)**. In **Parimal's case (supra)** respondent-wife refused to receive notice of the petition sent by court on 4.5.1989 vide registered AD cover for the date of hearing on 6.7.1989. On 28.6.1989, she was present at her house when the process server showed the summons to her. She read the same and refused to accept it. Refusal was reported by the process server which was proved as Ex. OPW1/B. Again on 7.8.1989, she refused to accept notice for 8.9.1989 sent by the court through process server. The court ordered issuance of fresh notices. One was issued vide ordinary process and the other vide Registered AD cover for 8.9.1989. Registered AD was returned to the Court with report of refusal as she declined to receive the AD notice. Under the Court's order, summons were affixed at the house of the respondent/wife, but she chose not to appear. She was served through notice on 6.11.1989 published in the newspaper 'National Herald' which was sent to her address, 3/47, First Floor, Geeta Colony, Delhi. This was placed on record and was not rebutted by the respondent/wife in any manner. After service vide publication dated 8.11.1989 as well as by affixation, respondent-wife was proceeded ex-parte in the divorce proceedings. Two years after passing of the decree of divorce on 16.10.1991, the appellant got married and had two sons aged 17 and 18 years respectively from the said marriage. The wife, after expiry of period of four years of the passing of ex pate decree of divorce dated 28.11.1989

moved an application dated 17.12.1993 for setting aside the same basically on the grounds that ex parte decree had been obtained by fraud and collusion with the postman etc. to get the report of refusal and on the ground that she had not been served notice even by substituted service and even subsequent to obtaining decree of divorce, the husband did not disclose the fact of grant of divorce to her during the proceedings of maintenance under Section 125 of the Criminal Procedure Code, 1973. In the face of aforesaid facts and circumstances, Hon'ble the Apex Court in para 22 of the judgment has held that the first appellate court should not disturb and interfere with the valuable rights of the parties which stood crystalized by the trial court's judgment without opening the whole case for re-hearing both on the question of facts and law. More so, the appellate court should not modify the decree of the trial court by a cryptic order without taking note of all relevant aspects, otherwise the order of the appellate court would fall short of considerations expected from the first appellate court in view of the provisions of Order 41 Rule 31 of the Code and such judgment and order would be liable to be set aside.

In para 24, it has been held that the High court has not set aside the material findings recorded by the trial court in respect of service of summons by process server/registered post and substituted service. The High Court failed to discharge the obligation placed on the first appellate Court as none of the relevant aspects have been dealt with in proper perspective. It was not permissible for the High Court to taken into consideration the conduct of the appellant subsequent to passing of the ex parte decree. More so, the High Court did not consider the grounds on

which the trial court had dismissed the application under Order 9 Rule 13 of the Code filed by the respondent/wife. The appeal has been decided in a casual manner.

The aforesaid observations from the referred authority, by no stretch of imagination can be applied to the case at hand wherein the trial court has not even bothered to record a finding that the appellant was either served in the case or she otherwise had knowledge of pendency of divorce proceedings, in view of discussion made hereinbefore.

In **Babita Laul's case (supra)**, there was a clear cut finding that in the month of April 2003, the wife had the knowledge that the respondent is going to contract second marriage for which she filed a suit for injunction at Chandigarh but she deliberately did not disclose the date of knowledge of this fact from which it was inferred that appellant had knowledge about decree of divorce as well but she still did not file an application and had rather concocted a ground that she came to know about the second marriage on 28.5.2003 when her father visited Kanpur. It was held that finding recorded by the court below about knowledge of the appellant regarding divorce proceedings and the decree is based upon evidence and do not call for any interference. However, the second question that application under Order 9 Rule 13 of the Code has become infructuous in view of the fact that respondent had performed second marriage was answered against the appellant-wife by relying upon judgment of the Allahabad High Court **S.P.Srivastava vs. Smt. Prem Lata Srivastava AIR 1980 Allahabad 336** and that of the Rajasthan High Court **Surendra Kumar vs. Kiran Devi AIR 1997 Rajasthan 63**.

In both the referred authorities, the first question with regard to service of appellant-wife in divorce proceedings has been answered against her but it is not so in the present case. In the given circumstances, the respondent can not derive any advantage to his contention merely because he has performed second marriage after obtaining ex parte decree of divorce at the back of his wife.

A similar controversy was raised before this court in **Ram Rattan's case (supra)** wherein this court after considering the judgment in **Babita Laul's case (supra)**, has held in para 20, reads thus:-

“Hence, in view of these facts, Babita Laul's case and Surender Kumar's case (supra) on which reliance has been placed on behalf of the petitioner are of no help to him. In those cases, it could not be proved that respondent-wife was having no knowledge about passing of ex parte judgment and ex parte decree against her and as respondent-husband had contracted the second marriage, after expiry of period of limitation, it was observed that application under Order 9 Rule 13 of the Code, after expiry of period of limitation, had become infructuous. Rather in another judgment rendered by this Court in **Prem Parkash Gupta vs. Asha Rani, 1991 (1) PLR 282**, it was observed that if wife is not duly served in the petition filed by husband for divorce, she could approach the court within thirty days from her gaining knowledge of ex parte decree and that even mere knowledge is not enough as she is required to have complete knowledge regarding the grounds on which such

petition was filed and ultimately decreed. It was further observed that the moment ex parte decree of divorce is set aside, the second marriage would automatically become void. On the same point, reliance has also been placed upon **Dr. Amardeep vs. Principal Judge, Family Court, Dehradun and another, 2007(4) RCR (Civil) 393.**

In view of the above, it can safely be held that as the appellant wife was not duly served in the divorce proceedings nor she had knowledge of pendency of divorce proceedings or ex parte decree of divorce at any time prior to 19.10.2009, she can not be made to suffer merely because the respondent-husband has performed second marriage and has a family. As has been held in **Ram Rattan's case (supra)**, the moment ex parte decree of divorce is set aside, the second marriage would automatically become void. In this view of the matter, I find merit in contention of the appellant that findings of the trial court on issues No. 1 to 3 suffer from a gross error and can not sustain. As a result, findings of the trial court on issue Nos. 1 to 3 are set aside and issues are determined in favour of the appellant and against the respondent. Accordingly, application filed by the appellant for setting aside ex parte decree of divorce dated 4.3.2008 is allowed with costs.

For the foregoing reasons, the appeal is allowed. The application under Order 9 Rule 13 of the Code for setting aside ex parte decree dated 4.3.2008 is allowed and decree dated 4.3.2008 is set aside. The divorce petition No.149 of 22.10.2007 is restored on the board of successor court of Sh. Gurvinder Singh Gill, the then Additional District Judge, Nawanshahr for decision, in accordance with law. The parties

through their counsel are directed to appear before the court concerned on 24.3.2020. The trial court shall put its best efforts to dispose of the case within a period of six months of the parties putting in appearance. The appellant-wife would file the written statement within a period of 25 days of the date fixed for appearance.

(Rekha Mittal)
Judge

17.2.2020
paramjit

Whether speaking/reasoned: Yes
Whether reportable : Yes/No