

DL. October
26. 31, 2022

F.M.A. 570 of 2020

Smt. Neha Mishra
Vs.
Sri Sanjeev Mishra

Mr. Syed Nurul Arefin,
Mr. Partha Chakraborty,
...for the appellant.

We are convinced that the respondent is avoiding service of notice. All communications addressed to the last known address of the respondent have returned unserved. The respondent has refused to accept notice on February 7, 2020 and thereafter had remained unrepresented.

Under such circumstances, we propose to decide the matter ex parte.

The impugned order in this appeal has arisen out of a miscellaneous case filed by the appellant under Order IX Rule 13 of the Code of Civil Procedure for recalling of the ex parte decree. The appellant contends that she represented on all the dates and there has been no lack of diligence on her part to pursue the matter. The order sheets of the miscellaneous case are placed before us to substantiate the aforesaid contention.

The application for recalling of the ex parte decree was filed on February 1, 2014. We have gone through the order sheets from which it appears that on September 15, 2016 cross examination of the appellant was concluded and on the prayer of the appellant the matter was adjourned. On August 12, 2014, the appellant prayed for an adjournment. On the fateful day, it was contended that the appellant could not appear due to late arrival of

the train.

However, having regard to the fact that the evidence was almost concluded, the matter could not have been dismissed on merits without giving a further opportunity to the petitioner. The trial court, however, could have dismissed the matter for default. The decision on merits of the controversy in absence of the appellant is not permissible.

Under such circumstances, we set aside the order impugned. We direct the trial court to dispose of the application on merits on the basis of the available record. The trial court may fix a firm date for argument and in the event the appellant or the respondent or either is not represented, the trial court may conclude the hearing and pass final order on the basis of the materials available on record.

Since the respondent is not represented, the department is directed to communicate this order to the respondent by speed post with acknowledgment due within one week from date. The cost for such communication shall be deposited by the appellant by Friday next failing which this order shall stand recalled.

The appeal and the connected application for stay filed under CAN 9462 of 2019 are, thus, disposed of.

There will be no order as to costs.

(Soumen Sen, J.)

dns

(Uday Kumar, J.)

