

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.84 of 2020

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Rekha Kumari D/o Gupteshwar Singh, W/o Akhilesh Kumar Singh R/o
Village-Patadhi, P.O. Kirhindi, P.S. Shivsagar, District-Rohtas.

... .. Appellant/s

Versus

1. Akhilesh Kumar Singh Son of Late Rameshwar Singh R/o Village-Bhabua
Ward No.3, P.S. Bhabua, District-Kaimur at Bhabua
2. Jai Shankar Patel S/o Munna Singh Patel, R/o Vill- Kochas, Near East High
School, P.S. - Kochas, District- Rohtas

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr.Dharmendra Kumar Singh, Adv.
For Respondent no.1 : Mr.Rajesh Kumar, Adv &
Mr.Vinod Kumar Seth, Adv.
For Respondent no. 2 : Dr. Iti Suman, Adv.
Mr. Saroj Kumar, Adv.

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CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI

and

HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY)

Date : 23-08-2024

The present appeal is directed against the *ex-
parte* judgment and decree dated 13.09.2019 and 20.09.2019
respectively passed in Matrimonial Case No. 54 of 2018 by the
Court of Principal Judge, Family Court, Kaimur at Bhabua,



whereby and whereunder the learned Court has decreed the suit ex-parte for divorce under section 13 of the Hindu Marriage Act, 1955.

2. Briefly stated the fact of case is that marriage of appellant with respondent no. 1 was solemnized on 08.12.2015 according to Hindu customs and Rights at Patadhi, P.S. Shivsagar, District- Rohtas. After marriage when respondent no. 1 went to bed room, he was not allowed to touch the body and reason behind the said act is stated by the appellant that she loved with Jai Shankar Patel (respondent no. 2) and she would remain in his company and her marriage was forcibly solemnized by her family members and she did not want to live with the respondent no. 1 nor did she had physical relation with him. When respondent no. 1 approached on another night, he was threatened by the appellant for committing of suicide. It is alleged that respondent no. 1 did not want to share the aforesaid facts in order to protect his dignity and he faced miserable and precarious life in light of the aforesaid facts. It is further alleged that appellant always used to talk on the mobile number 7388636665 of Jai Shankar Patel (respondent no.2). Respondent no. 1 is the only son of his parents and there is none to cook food in the house. Respondent no. 1 wants to keep his wife after



ignoring all the acts that have been committed by her. She came to sasural (matrimonial home) at her own will and returned back to Maike (parental home). During course of arrival and departure from Maike (parental home) to Sasural (matrimonial home), she gave birth to one alleged to be illegal child. When query was made regarding birth of the aforesaid female child, she did not reply stating that respondent no. 1 has nothing to do with the birth of the child. Respondent no. 1 states that whenever he joined his duty and was absent, respondent no. 2 was summoned to his house and before his arrival, respondent no. 2 was instructed to leave. When same was protested by respondent no.1, he was being threatened by appellant for implicating in false case. The appellant was very much adamant not to live with the respondent no.1, rather she wanted to live with Jai Shankar Patel (respondent no. 2). It is averred in the plaint by the respondent no. 1 that he made a last resort by way of giving proposal on 20.02.2018 to break the relation for which the appellant did not agree. It is asserted by the respondent no. 1 that appellant has filed a case vide Shiv Sagar P.S. Case No. 358 of 2017 under the provisions of Dowry and Prohibition Act for harassing him.

3. Learned counsel for the appellant submits that



marriage between both the parties has taken place on 08.12.2015 as per Hindu Customs. Learned counsel further submits that without service of notice, the matrimonial suit was fixed for *ex-parte* hearing and the same has been decreed *ex-parte* and decree of divorce has been granted in favour of the respondent no. 1 vide judgment and decree dated 13.09.2019 and 20.09.2019 respectively. It has been submitted that summon of matrimonial suit has not been served upon the appellant and behind her back, respondent no. 1 succeeded in obtaining order that notice has validly been served upon the appellant. It has been submitted that on 25.04.2019 proceeding against *ex-parte* has been started by the learned court and within one month, all the three witnesses have been examined by the concerned court. It is submitted on behalf of the appellant that the allegation made by the respondent no. 1 that birth of a female child by the appellant is illegal which is totally wrong and appellant is ready for D.N.A. test for her daughter because she denied any love affair with any person. The impugned judgment has been passed in most mechanical manner and appellant was prevented to contest the suit as no proper notice was served on the appellant during pendency of the suit.

4. Learned counsel for the respondent no. 1 has



submitted that order passed by the Family Court is justified and legal as proper notice has been served on the appellant and the concerned Court has passed order on basis of the materials available on record. Hence, no interference is needed.

5. The Principal Judge, Family Court, Kaimur at Bhabua has examined three witnesses on behalf of the respondent no. 1. They are PW-1 Sandip Kumar, PW-2 Sunil Kumar Singh and PW-3 Akhilesh Kumar Singh (respondent himself) and no documentary proof has been adduced on behalf of the respondent.

6. From perusal of the record we are satisfied that *ex-parte* judgment is legally unsustainable on the ground of non-service of notice upon the appellant-wife and the same needs to be remanded for retrial, we are not inclined to go into merits of the present appeal as the same might affect the case of either of the parties when matter is retried by the trial court on merit.

7. For the purposes of examining as to whether the *ex-parte* judgment was rightly passed by the learned Principal Judge, Family Court, we have perused the record of Family Court and from the order-sheet of the matrimonial case, it appears that the plaint supported with affidavit along with



power has been filed on 27.02.2018. On 30.07.2018 case is admitted for further proceeding and there is a direction to furnish necessary requisites for issuance of notice for appearance of opposite party-appellant. On compliance of previous order dated 30.07.2018 O.C. is directed to issue notice against appellant on 20.08.2018. Order-sheet of 21.08.2018 indicates that requisites has been filed by the respondent no. 1 and OC is directed to issue notice against appellant. Order-sheet dated 09.10.2018 indicates that a registry receipt has been filed on behalf of the applicant-respondent no. 1. On 31.10.2018, it has been reflected that again notice is issued for appearance of opposite party -appellant. On 31.01.2019 the Court has jumped into the conclusion that newspaper publication is required against opposite party-appellant on the prayer made by the applicant-respondent no.1. Order-sheet dated 18.03.2019 indicates that publication was made in Prabhat Khabar on 22.02.2019. On 25.04.2019 case was put up on *ex-parte* hearing against O.P.-appellant.

8. The order-sheet of different dates of Family Court regarding service of summons indicate how casually and in a routine manner order has been passed and there is no whisper to the extent that court is satisfied with the service of



notice served upon the appellant. From order-sheet dated 27.02.2018 to order-sheet dated 17.12.2018, there was no whisper whether the service of notice is satisfactorily served upon the appellant-wife or not and the Family Court has jumped to the conclusion that newspaper publication is required on 31.01.2019.

9. Further Order 5 of the Civil Procedure Code (hereinafter referred to as "Code") makes provision for issuance and service of summons. Rule 9 thereof provides where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of summons, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper officer to be served by him or one of his subordinates or to such courier services as are approved by the Court. Under sub-rule (3) of Rule 9, the services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgment due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the Court.

10. Rule 17 of Order 5 of the Code prescribes the



procedure when defendant refuses to accept service, or cannot be found. It provides that if the defendant cannot be found, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then 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 by whom the house was identified and in whose presence the copy was affixed. Under Rule 19 of Order 5 of the Code, examination of the serving officer is must where a summons is returned under Rule 17, as above.

11. Upon being satisfied after examination of the serving officer that the defendant is keeping out of the way for the purpose of avoiding service, the Court may proceed to invoke Rule 20 (1) to direct service by affixing in some conspicuous place in the Court house and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit. Thus, before proceeding to direct substituted service the



procedure prescribed under Rules 9 and 19 of Order 5 of the Code has to be followed. Further, Rule 20 (1-A) of the Code provides that where the Court acting under sub-rule (1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.

12. In the present case, though there is an order to issue notice to the appellant-wife but on the point of service of notice, the court has not made any whispering as to whether notice was properly served upon appellant-wife or not and at once after 31.01.2019 the court has directly come to conclusion that publication was required in the present case.

13. In the light of aforesaid facts and circumstances of the case, it is necessary to quote judgment of Hon'ble Supreme Court rendered in the case of *Yallawwa v. Shantavva*, reported in *(1997) 11 SCC 159* in which it has been held that the trial court could not have almost automatically granted the application for substituted service without taking steps for serving the respondent by ordinary procedure as laid down by Order 5 Rules 12, 15 and 17 of the Code. It must be kept in view that substituted service has to be resorted as the last



resort when the defendant cannot be served in the ordinary way and the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way. The Hon'ble Supreme Court further observed that it appears that almost automatically the procedure of substituted service was resorted to. In the instant case also, as mentioned in the preceding paragraphs, the learned trial court has almost instantly allowed the prayer without recording the satisfaction about the prerequisites for exercise of power under Order 5 Rule 20 of the Code.

14. In the present case, the learned Principal Judge, Family Court has passed the order in a casual and mechanical manner. The order dated 25.04.2019 clearly indicates that case has been fixed for *ex-parte* hearing without taking proper recourse. The case which is related to the matrimonial dispute concerning annulment of marriage or divorce proceeding is a serious matter and it connects entire life of husband and wife against whom a decree for declaration of nullity or divorce has been sought. In the said matter, the court should not follow mechanical approach for compliance of issuance of notice rather the court should take all statutory



provision into account which is expected about the prerequisites for exercise of power under Order 5 Rules 12, 15, 17 and 20 of the Code regarding issuance of summon for appearance of the party.

15. Having regard to the facts and circumstances of the case, we are satisfied that appellant-wife was not duly served with the notice and the procedure adopted for directing substituted service being vitiated, therefore, the *ex-parte* judgment passed against the appellant-wife deserves to be set aside. Accordingly, the judgment and decree dated 13.09.2019 and 20.09.2019 respectively passed in Matrimonial Case No. 54 of 2018 by the Court of Principal Judge, Family Court, Kaimur at Bhabua is set aside. Matrimonial Case No. 54 of 2018 is restored on the file of Principal Judge, Family Court, Kaimur at Bhabua. The learned Family Court is requested to take afresh decision in accordance with law on its own merit within a period of six months from the date of receipt/production of a copy of this judgment, after giving ample opportunity of adducing evidence and hearing to the respective parties. Parties are directed to co-operate in disposal of Matrimonial Case No. 54 of 2018. Parties shall appear before the Family Court, Kaimur at Bhabua on 09.09.2024 at 3.00 pm, without further



notice of appearance.

16. The trial court record be sent back to the learned trial court forthwith.

(P. B. Bajanthri, J)

(Alok Kumar Pandey, J)

mcv/amitkumar

AFR/NAFR	AFR
CAV DATE	14.08.2024
Uploading Date	23.08.2024
Transmission Date	

