

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.136 of 2022

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Gopal Prasad Sah Son of Jagat Kishore Modi @ Jagat Kishor Sah, permanent resident of Baniya Patti, P.S.- Sahibganj, District - Sahibganj, Jharkhand.

... .. Appellant/s

Versus

Premlata Jaiswal Wife of Gopal Prasad Sah, daughter of Radha Krishna Jaiswal, resident of Rajeev Nagar, Road No. 18, P.S.- Rajeev Nagar, District - Patna, Bihar.

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. N.A. Shamsi, Advocate
: Mr. Nawal Kishore Prasad, Advocate
For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY)

Date : 23-04-2024

Service of notice to respondent-Premlata Jaiswal was completed on 20.09.2023. Notice is stated to have been received by her father. Jointness petition was filed and it was accepted by this court. Neither she appeared nor through any counsel. It is to be noticed that before the Family Court also she remained absent.

2. The present appeal is directed against the judgment and decree dated 19.01.2022 passed in Matrimonial (Divorce)



Case No. 346/2015 by the Court of Additional Principal Judge, Family Court, Patna, whereby and whereunder the learned trial court has dismissed the divorce petition filed by the appellant under Section 13 (I)(i-a) and (i-b) of the Hindu Marriage Act, 1955.

3. Briefly stated facts of the appellant's case is that the marriage of the appellant was solemnized on 03.12.1998 with the respondent at Patna according to Hindu Rites and Customs. It is claimed that the Respondent went to her matrimonial house at Sahibganj where the appellant resided with his parents and was working as an Assistant at Life Insurance Corporation of India. It is further claimed by the appellant that respondent was adamant to have separate accommodation without any rhyme and reason. When separate accommodation was taken on rent, the elder brother-in-law of the respondent started visiting the respondent in the absence of the appellant during his working hours. When the same was enquired about, the respondent made quarrel with the appellant, causing mental agony to him. After passage of time, the respondent blessed with female child on 28.03.2000. After birth of the child, respondent pressurized the appellant to settle in Patna and the same was denied by the appellant. The appellant tried his best to pacify the



relation with the respondent but all went in vain as she was adamant to settle at Patna. On 06.08.2001, the respondent went to her maternal house. When the appellant visited the respondent at Patna to bring her back, same was reciprocated by the respondent. It is alleged that respondent became aggressive and started threatening the appellant and his parents to implicate them in false case of dowry for which she filed an Informatory Petition No. 129/2001 dated 25.09.2001 before the learned C.J.M., Sahibganj. It is further alleged that respondent finally went to her maternal house on 28.10.2001 i.e. approximately two months after returning, without giving any reasonable explanation to the appellant thereby deserting the appellant and putting an end to the matrimonial relationship. Appellant filed another informatory petition no. 149/2001 dated 29.10.2001 regarding act of desertion on the part of respondent. It is claimed that upon returning to her maternal house, the respondent filed a false Complaint Case No. 708(C) of 2002 on 27.06.2002 under Section 498A/34 of the Indian Penal Code and Section 3/4 of the Dowry Prohibition Act against the appellant and his family members at Patna with the sole intention to cause harassment and mental agony to the appellant. It is further claimed that despite filing of the aforesaid case by the respondent, appellant



made an attempt to reconcile his relationship with the respondent and he had filed a Matrimonial Case No. 78 of 2003 before the learned Principal Judge, Family Court, Patna under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights and the case was dismissed vide order dated 30.07.2012. Respondent filed Maintenance Case No. 63 (M) of 2004 before the learned Principal Judge, Family Court, Patna with the intention to harass the appellant and the concerned court is directed the appellant to pay a sum of Rs.12,000/- in favour of the respondent and Rs.6,000/- in favour of daughter towards maintenance. The appellant was also directed to pay a lump-sum cost of Rs.10,000/- to the respondent. It is claimed by the appellant that upon failure of all the possible steps to reconcile the marriage with the respondent, the appellant left with no other option but to file Divorce Suit No.04/2014 before the learned Principal Judge, Sahibganj and the same was transferred to Patna by the Hon'ble Supreme Court in Transfer (Civil) No.819/2014 vide order dated 27.01.2015 filed by the respondent.

4. Learned counsel for appellant has submitted that impugned judgment and decree dated 19.01.2022 has been passed in Matrimonial (Divorce) Case no. 346 of 2015 in most



casual and perfunctory manner against the weight of evidence and thus is unsustainable and the same is without having spirit of law. Learned counsel for the further submits that marriage was irretrievably broken down as the respondent has deserted the appellant for almost 21 years and there was no chance of reconciliation or reunion of the parties. The concerned court has failed to appreciate the fact of the elements of *factum deserendi* and *animus deserendi*. Learned counsel further submitted that the learned trial court has not appreciated the deposition of the witnesses who proved desertion and cruelty inflicted by the respondent upon the appellant and his family members. Learned counsel further submitted that the learned trial court has failed to appreciate the fact that the respondent deliberately failed to appear before the learned court despite receiving the summons and notices and such omission on part of the respondent is evident of the fact that the respondent does not want to keep any ties with the appellant. Learned counsel further submitted that the learned trial court has failed to appreciate the fact that the respondent was aware of the divorce proceedings filed by the appellant in view of the fact that the respondent had filed Transfer Petition (Civil) No. 819/2014 before the Hon'ble Supreme Court for transfer of Divorce case from Sahibganj to



Patna and despite the same, the respondent failed to appear in the proceedings.

5. The Principal Judge, Family Court, Patna has examined three witnesses on behalf of the appellant. They are AW-1 Gopal Prasad Shah (appellant), AW-2 Shambhu Prasad Verma and AW-3 Shivshankar Sah, besides other documents.

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 respondent-Premalata Jaiswal and the same need to be remanded for retrial, we are not inclined to go into the details of merit of the present appeal, as any observation on that count might affect the case of either of the parties when matter is retried by the trial court on merit.

7. From perusal of order sheet dated 31.03.2015, it is crystal clear that that Matrimonial Case No. 346 of 2015 filed by the appellant under Section 13 (I) (i-a) and (i-b) of the Hindu Marriage Act, 1955 [Gopal Prasad Sah (appellant) Vs. Prem Lata Jaiswal (respondent)] has been received in the Court of Principal Judge, Family Court, Patna. On 24.06.2015, the office was directed to issue notice to O.P./respondent. On 30.05.2016, office was directed to issue notice upon respondent through registered post by 02.07.2016. On 15.11.2016, again order was



issued to issue notice through registered post to be served upon respondent by 19.12.2016 and office was also directed for the publication in daily news paper “Dainik Jagran.” On 19.12.2016, again order was issued for publication in daily newspaper “AAJ” by 23.01.2017. On 18.03.2017, the case was fixed for *ex-parte* hearing.

8. The order sheet of different dates of Family Court regarding service of summons indicate that how casually and in a routine manner order has been passed and there is no whisper on any specific date that court has satisfied with the service of notice served upon the respondent-Premalata Jaiswal. The first order sheet dated 24.06.2015 clearly indicates that notice was directed to be issued upon the respondent-Premalata Jaiswal and from the first order sheet dated 24.06.2015 where notice was directed to be issued to the last order sheet dated 18.03.2017 on which the case was fixed for *ex parte* hearing, there was no whisper whether service of notice is satisfactorily served upon the respondent-Premalata Jaiswal or not and the Family Court has jumped to the conclusion that publication in newspaper is required and there is no whisper how court has not made any specific opinion prior to invoking substituted service of summon was completed.



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 respondent i.e. appellant's wife but on the point of service of notice, the court has not made any whispering as to whether notice was properly served upon the respondent i.e. appellant's wife or not and at once on 15.11.2016 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 instantly jumped to the conclusion 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 order in a casual and mechanical manner. The order sheet dated 18.03.2017 clearly indicates that case has been fixed for *ex parte* hearing where order sheet describes regarding how many processes have been exercised for the appearance of respondent but the Court has not made any observation about the processes which have been executed under the statutory provision with the satisfaction of Court. The order sheet only indicates that the paraphernalia and the processes have been done to show that all the processes have been exhausted but in reality the statutory provisions have not been complied and the case has been fixed for ex-parte hearing without taking proper recourse which is mandatory requirement under statutory provision. 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 respondent-Premalata Jaiswal 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 respondent-Premalata Jaiswal deserves to be set aside. Accordingly, the judgment and decree dated 19.01.2022 passed in Matrimonial (Divorce) Case No. 346 of 2015 by the Court of Principal Judge, Family Court, Patna is set aside. Matrimonial (Divorce) Case No. 346 of 2015 restored on the file of Additional Principal Judge, Family Court, Patna. The matter is remitted back to the learned Family Court for decision afresh 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 (Divorce) Case No. 346 of 2015.

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

17. Pending I.A.’s, if any, stands disposed of.

(P. B. Bajanthri, J)

(Alok Kumar Pandey, J)

amitkumar/alok

AFR/NAFR	AFR
CAV DATE	08.04.2024
Uploading Date	23.04.2024
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