

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.382 of 2021

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Sardar Manjit Singh @ Manjit Kapoor Son of Sardar Sant Singh Manaurani
road, Near Hanuman Mandir, Sankat Mochan Colony, Ward no. 7, P.s.-
Madhubani, District- Madhubani

... .. Appellant/s

Versus

Bauty Chaturvedi @ Beauty Kapoor Wife of Sardar Manjit Singh @ Manjit
Kapoor daughter of Late Kavindra Chaturvedi, resident of House no. 88,
Gurhatta, Baksshi Mohalla, Near Sanjay Printing Press, Ranipur, P.s.-
Khajekala, Patna City, District- Patna

... .. Respondent/s

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Appearance :

For the Appellant/s : Mrs.Soni Shrivastava, Adv.
For the Respondent/s : None

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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 : 15-03-2024

The present appeal is directed against the
judgment dated 20.02.2021 passed in Matrimonial Case No. 102
of 2019 (C.F. No. 102 of 2019) by the Court of Principal Judge,
Family Court, Madhubani whereby and whereunder the
application filed by the appellant-husband under Section 12 of
Hindu Marriage Act, 1955 for declaring his marriage with
respondent-wife as null and void has been dismissed.

2. Briefly stated the fact of appellant's case is that
marriage of appellant with respondent was solemnized on
31.07.2015 in Arya Samaj Mandir, K-1319 Sector 9 Vijay



Nagar, Ghaziabad, (Uttar Pradesh). Subsequently the marriage was registered before the Registrar (Hindu Marriage), Ghaziabad, Uttar Pradesh. It is claimed by the appellant that appellant and respondent solemnized marriage as per Hindu Customs and Ceremony on 12.06.2017 at Madhubani, Bihar and thereafter the respondent-wife returned to her parental home (maike). It is further averred in the petition that marriage was not consummated. It is further averred that both parties resided at common place, namely, Mangaurani Road, Near Hanuman Mandir, Sankat Mochan Colony, Ward No. 7, P.S. Madhubani, District Madhubani, Bihar, which is father's house of the appellant. During course of residing at common place, as mentioned above, respondent-wife never co-habitated or never established sexual relationship with the appellant, taking excuse on one or other pretext. It is further averred in the petition that no physical relation was established between the appellant and respondent thereby marriage has not been consummated. It is further claimed that treatment of respondent-wife started at Jyoti Punj Hospital situated at Boring Road, Patna and lastly the Gynaecologist after various examinations and medical test informed the appellant-husband that respondent-wife suffered from Blind Vagina and she could not established sexual



relationship. It is claimed by the appellant himself that said query was inquired from the respondent and she admitted that she was aware of the physical and medical fact that she was not able to have a normal physical and sexual relationship with husband and she concealed the aforementioned factual aspects. It is further averred in the petition that on 16.04.2018, the appellant came to know about the respondent having Blind Vagina and she was not in a position to establish sexual relationship and since 16.04.2018 both parties are living completely separate from each other and prayer has been made to declare the marriage of appellant with respondent null and void on the ground of female sexual dysfunction (FSD).

3. Learned counsel for the appellant submits that all the process have been exhausted but the respondent-wife did not turn up before the Family Court and case was fixed for *ex parte* hearing against the respondent-wife on 06.01.2020. Learned counsel further submits that there is a specific averment in the petition that on account of FSD of the respondent, the marriage has not been consummated but the learned Principal Judge, Family Court has not specifically made any contention on the said ground. Hence, the judgment dated 20.02.2021 is not tenable and sustainable in the light of fact that the Family Court



has taken into account irrelevant material which has no concern with the averment made in the petition. Learned counsel further submits that it has been specifically contended in para- 17 and 18 of the petition that on account of Blind Vagina both parties are living separately from each other and the said fact was not in the knowledge of the appellant prior to 16.04.2018 and it has also been specifically asserted by the appellant that he came to know regarding the said fact on the basis of medical examination of a lady doctor and the said fact has not been taken into account by the Principal Judge, Family Court, Madhubani and the impugned judgment has been passed without appreciation of the facts as asserted in the petition.

4. The Principal Judge, Family Court, Madhubani has examined three witnesses on behalf of the appellant. They are AW-1 Sardar Manjit Singh @ Manjit Kapoor (appellant himself), AW-2 Sardar Sant Singh and AW-3 Madanlal Khandelbal.

5. 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-wife and the same need to be remanded for retrial, we are not inclined to go into the details of the averment made by the appellant in his petition, 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.

6. 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 which it can be assessed that suit was filed on 22.04.2019. On 04.05.2019 the Family Court directed for issuance of notice upon the respondent and on 15.05.2019 direction was given to issue notice, if requisites regarding notice is available. On 25.07.2019 the Presiding Officer was on current duty and on 14.08.2019 application was filed on behalf of the appellant for publication in newspaper and on 02.09.2019 format for publication was submitted on behalf of the appellant. On 23.09.2019 cutting of paper publication was submitted. On 06.01.2020 case was fixed for *ex parte* hearing against the respondent-wife.

7. 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 whispering on 04.05.2019 that court has satisfied with the service of notice served upon the respondent. The first order sheet dated 04.05.2019 clearly indicates that notice was to be



served upon the respondent-wife and from 04.05.2019 to last order sheet dated 06.01.2020 on which case was fixed for *ex parte* hearing, there was no whispering whether the service of notice is satisfactorily served upon the respondent-wife or not and the Family Court has jumped to the conclusion that format of the publication is required and it is not clear from the order sheet itself how the publication has been made. Even in order dated 14.08.2019 the name of newspaper in which notice was to be published is not forthcoming.

8. 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.

9. 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.

10. 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.

11. In the present case, though there is an order to issue notice to the respondent-wife but on the point of service of notice, the court has not made any whispering as to whether notice was properly served upon respondent-wife or not and at once after 15.05.2019 the court has directly come to conclusion that publication was required in the present case though the name of newspaper has not been revealed in the said order.

12. 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.

13. In the present case, the learned Principal Judge, Family Court has passed the order in a casual and mechanical manner. The order dated 06.01.2020 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. Besides this, the Family Court has not specified the contention of the party while passing the judgment. The author of the medical report (Ext-1) has also not been examined. For deciding the aforesaid matter, it is necessary to give finding upon the contention which is the basis of the present appeal.

14. Having regard to the facts and circumstances of the case, we are satisfied that respondent-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 respondent-wife deserves to be set aside. Accordingly, the judgment dated 20.02.2021 passed in Matrimonial Case No. 102 of 2019 (C.F. No. 102 of 2019) by the Court of Principal Judge, Family Court, Madhubani is set aside. 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.

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

(P. B. Bajanthri, J)

(Alok Kumar Pandey, J)

shahzad/-

AFR/NAFR	AFR
CAV DATE	04.03.2024.
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