

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.182 of 2022

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Soni Kumari @ Soni Devi, aged about 34 years (Female), W/o Mantu Prasad @ Mantu Kumar, D/o Late Kisto Prasad R/o Village- Gopalganj, P.S.- Thave, District- Gopalganj, at present R/o Village- Kako, P.S.- Kako, District- Jehanabad.

... .. Appellant/s

Versus

Mantu Kumar @ Mantu Prasad, aged about (Male), S/o Late Prem Prasad, R/o Village- Kako, P.S.- Kako, District- Jehanabad.

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Vishwajeet Kumar Mishra, Advocate
	:	Mr. Rohit Kumar Tripathi, Adocate
For the Respondent/s	:	Mr. Deepak Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE RAMESH CHAND
MALVIYA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAMESH CHAND)

Date: 09-01-2024

Learned counsel for the parties have been heard.

2. The instant miscellaneous of appeal is being filed by the appellant to set aside the order and decree dated 05.11.2016 passed by learned Principal Judge Family Court, Jehanabad in Matrimonial Case No. 140 of 2015 whereby and where-under the learned Principal Judge Family Court, Jehanabad has been pleased to grant ex-



parte decree of divorce in favor of respondent-Husband.

3. The marriage among Appellant and Respondent solemnized in the year 2009 according to Hindu rites and customs and three children were born from the married life of the Respondent-Husband and Appellant-Wife. It is alleged that the Respondent-Husband has tried many times to bring the Appellant-Wife to come to her matrimonial home and to establish the married life, but Appellant- wife is not ready to come to her matrimonial home the appellant-Wife is determined to live alone. She is not prepare and willing to compromise with the husband to re-establish married life.

4. Learned counsel for the Appellant submits that the appellant is legally wedded wife of the respondent and the marriage of the appellant was solemnized in the year 2009 with Hindu rituals. He further submits that the appellant is living with the respondent-husband from the day of marriage but the respondent-husband filed Matrimonial Case No 67 of 2014 for restitution of



conjugal rights in the year 2014 with malafide intentions for laying foundation for divorce while the appellant-wife was living peacefully with the respondent-husband. The counsel for the Appellant-wife also submits that the Respondent-husband filed a wrong address and sent summons notice to the Appellant-wife on wrong address along with that the newspaper publication was also done on the wrong place and the appellant-wife had no knowledge about the said case.

5. The learned counsel of the Respondent-Husband submitted that he is well acquainted with the facts and circumstances of this case and submitted that the appeal filed by the appellant-wife is not maintainable in the eye of law and stated that proper notice has been served to the Opposite Party-Wife in the Matrimonial Case No. 67 of 2014 before the learned Family Court, Jehanabad for restitution of conjugal rights but it has been wrongly stated by the Appellant-wife in para 1 that the Matrimonial Case No. 67 of 2014 of filed for dissolution of marriage. The Learned Counsel further submits that the Appellant-wife



appeared on 20.06.2014 along with her Vakalatnama but did not file her written statement and after several dates, the Appellant-wife did not appear. Thereafter, the Learned family Court, Jehanabad made an ex-parte order and judgment on 10.12.2014. Thereafter the Respondent-Husband filed a Matrimonial case No. 140 of 2015 against the Appellant-wife under section 13 (A) of Hindu Marriage Act for dissolution of marriage, for which notice of summons was issued to the Appellant-wife on several dates by speed-post and thereafter service of notice through newspaper publication was also undertaken, but the Appellant-wife did not appear and subsequently ex-parte judgment was passed on 26.08.2016 in favour of the Respondent-husband. The Learned counsel also submitted that the Appellant-wife has also submitted a self-declaration on 05.05.2017 stating that she does not want to continue her conjugal life with the Respondent-Husband.

6. The arguments have been completed by only Respondent-Husband in the present matter before the Court of Principal Judge



Family Court, Jehanabad vide Matrimonial Case No. 140 of 2015, whereas, the Appellant-Wife was remained absent before the learned Family Court, and service of notice was not completed. The registry summons received on 07.05.2016 by the Ld. Trial Court was also a blank document enclosed in an envelope.

7. Dealing with the present case, learned trial Court (Family Court) recorded the findings and the appellant-wife was not present during the entire proceeding of the Matrimonial dispute. Therefore, the Family Court has decided the matter without hearing the Opposite Party-Wife proceeded to pass an ex-parte judgment in favor of the respondent- husband.

8. Before reaching the finding by this Court, there was no attempts of reconciliation between the husband and wife which is evident from several orders of this Court as well as the Family Court.

9. On the basis of pleadings of the parties, the following points are formulated for determination of the present appeal:-



“Whether summons has been duly served to the Appellant-Wife or not?”

10. For the purposes of examining as to whether the ex parte decree was rightly passed by the trial Court, we have perused the record of the trial Court, from which it can be gathered that the suit was filed on 16.12.2015 and on 22.12.2015 the Family Court directed for issuance of summons. On the next date i.e., 04.03.2016, the Family Court observed that the registered notice has been returned unserved with endorsement that the notice has left the place. Thereafter on 07.04.2016 the notice was also unserved. **The registered postal summon received on 07.05.2016 was a blank paper enclosed in an envelope.** Several notices were sent upon the address of the respondent, yet the summons could not be served on such address, therefore, it appears, the defendant was avoiding/refusing to accept notice, thus substituted service by newspaper publication was necessary. The prayer for substituted service was allowed by the trial



Court and the notice was published in the Newspaper dated 06.08.2016 and the Ld. Court received a copy of the same on 30.08.2016. After giving the last chance to the defendant to appear before the Court on 4.11.2016, the Family Court proceeded to pass an ex parte judgment and order and it was passed on 05.11.2016.

11. It is argued that the appellant-wife's address i.e., Soni Devi, D/o Late Kishto Prasad, Resident of- Gopalganj, P.S. Thawe, Dist. Gopalganj, which is the address mentioned in the present appeal also, therefore, the address was proper but the postman never tendered the notice to the appellant and as such at the first instance, genuine effort was not made to serve the appellant.

12. Since the appellant has not avoided to accept the notice at any point of time, the order of newspaper publication was bad in law Per contra, learned counsel for the respondent-Husband would argue that the notice by way of newspaper publication is sufficient notice of the proceedings to the appellant-wife and since



despite such newspaper publication the appellant failed to appear, the trial Court rightly proceeded ex parte and the impugned judgment and decree does not call for any interference.

13. We have referred the provisions contained in CPC to observe Rule 17 of Order 5 as 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 CPC examination of the serving officer is must where a summons is returned under Rule 17, as above. The Court may proceed to



invoke Rule 20 to direct service by affixing in some conspicuous place in the 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 substitute service the procedure prescribed under various rules of Order 5 of the CPC which are:-

“Rule 9 - Delivery of summons by Court -

(1) 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 the 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.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and where he is such an officer, the summons may be sent to him in such manner as the Court may direct.

(3) 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 High Court or by the Court referred to in sub-rule (1) or by any other means of transmission of documents (including fax message or electronic mail service) provided by the rules made by the High Court:

Provided that the service of summons under this sub-rule shall be made at the expenses of the



plaintiff.

(4) Notwithstanding anything contained in sub-rule (1), where a defendant resides outside the jurisdiction of the court in which the suit is instituted, and the Court directs that the service of summons on that defendant may be made by such mode of service of summons as is referred to in sub-rule (3) (except by registered post acknowledgment due), the provisions of Rule 21 shall not apply.

(5) When an acknowledgment or any other receipt purporting to be signed by the defendant or his agent is received by the Court or postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee or by any person authorised by the courier service to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to accept the summons by any other means specified in sub-rule (3) when tendered or transmitted to him, ' - the Court issuing the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed, pre-paid and duly sent by registered post acknowledgment due, the declaration referred to in this sub-rule shall be made notwithstanding the fact the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of issue of summons.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of courier agencies for the purposes of sub-rule (1).

Rule 12: Service to be on defendant in person when practicable, or on his agent.-

Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on Such agent shall be sufficient.

Rule 15: Where service may be on an adult member



of defendant's family.- Where in any suit the defendant is absent from his residence at the time when the service of summons is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf, service may be made on any adult member of the family, whether male or female, who is residing with him.

Explanation: A Servant is not a member of his family within the meaning of this rule.

Rule 17 Procedure when defendant refuses to accept service, or cannot be found.-

Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, 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 (if any) by whom the house was identified and 'whose presence the copy was affixed.

Rule 19: Examination of serving officer.-

Where a summons is returned under rule 17, the **court shall**, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry



in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

Rule 20. Substituted service.-

(1) Where 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 court shall order the summons to be served by affixing a copy thereof 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.

(1A) 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.

(2) Effect of substituted service—Service substituted by order of the court shall be as effectual as if it had been made on the defendant personally.

(3) Where service substituted, time for appearance to be fixed—Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.”

14. Thereafter, this Court has referred to the Supreme Court's decision in the matter of **Smt. Yallawwa v. Smt. Shantavva, AIR 1997 SC 35** observed in paragraphs No. 17:-
“17. 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 CPC. 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 case at hand also, as mentioned in the preceding paragraphs, the trial Court has almost instantly allowed the application under Order 5 Rule 20 of the CPC without recording the satisfaction about the prerequisites for exercise of power under Order 5 Rule 20 of the CPC."

15. With regards to Section 9 of the Family Courts Act, 1984, which underlines the duty of the Family Court while dealing with



matrimonial disputes, it mandates the Family Court to make efforts for settlement meaning thereby that the Family Court is not expected to function in a mechanical manner to dispose of the matter on technical grounds. But in the present matter, the Ld. Family Court has not made any attempts of reconciliation between the Husband and Wife. Moreover, the *Supreme Court* in **Smt. Yallawwa (supra)** has held that the Ld. Family Court has passed ex-parte decree of divorce in a perfunctory manner without being satisfied about the service of notice. The Provision relating for Section 9 of the Family Courts Act 1984 provides the:

“Duty of Family Court to make efforts for settlement.

(1) In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.

(2) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.

3) The power conferred by sub-section (2) shall be



in addition to, and not in derogation of, any other power of the Family Court to adjourn the proceedings."

16. The Apex Court in the matter of **Naresh Chandra Aggarwal vs Bank of Baroda AIR 2001 SC 1253: (2001) 3 SCC 163** observed that- "When a party is sought to be impleaded in a legal proceedings service of notice on such party cannot be a mere formality but should, in fact, be a reality."

17. In the case at hand, the trial Court directed for issuance of summons on 04.05.2016 without specifying that the summon has to be issued by registered post, yet the plaintiff paid the process fee for service by registered post and thus, there was no effort by the trial Court to serve the defendant by ordinary mode. In the absence of any order for sending the notice by registered post, sending of such notice was itself contrary to the Trial Court's order.

18. Moreover, the Supreme Court in **Smt. Yallawwa (supra)** has 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 CPC. Thus, the effort to serve the respondent by ordinary mode is the primary requirement. This is so because, the process server is an employee and agent of the Court, whereas the employee of the postal department i.e., the postman is an outsider.

19. When the effort to serve the defendant in terms of the procedure prescribed under Rules 12, 15 & 17 of Order 5 CPC has not been followed, the order for service of notice by publication is itself rendered without satisfaction that the defendant is avoiding to receive notice. It appears, the trial Court has allowed the application in a mechanical manner without even examining the postman who has tried to serve the notice. Moreover newspaper daily publication namely 'Prabhat Khabar' dated 06.08.2016 in Patna edition for service of notice was indifferent district with reference to circulation.

20. After considering the facts and circumstances of this case and materials available on record along with the provisions of the laws laid



down has not been fulfilled and it is crystal clear that order of summons was not issued properly against the Appellant-wife and we are fully satisfied that the order proceeding ex-parte against the defendant was not in accordance with law, therefore, the order and decree passed by the trial Court is hereby set- aside.

21. In view of the facts and circumstances of the case, we direct the parties to appear before the trial Court on 05.03.2024. It is also directed that the appellant shall submit her written statement when she appears before the learned trial Court on 05.03.2024 and thereafter the trial shall be commenced and concluded within a period of six months from 05.03.2024. Party shall co-operate in the proceedings.

(Ramesh Chand Malviya, J)

(P. B. Bajanthri, J)

Brajesh Kumar/-

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