

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.254 of 2019

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Shobha Kumari @ Shova Kumari W/o Sri Sandeep Kumar D/o Kailash Rawat, Vill.- Lakra, P.o.- Matia, P.S.- Barhat, Distt.- Jamui (Bihar). Presently residing at Vill.- Ghorparna, P.o.- Gaura, P.S.- Laxmipur, Distt.- Jamui (Bihar)

... .. Appellant/s

Versus

Sandeep Kumar S/o Satish Mandal Vill.- Lakra, P.o.- Matia, P.s.- Barhat, Distt.- Jamui (Bihar)

... .. Respondent/s

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Appearance :

For the Appellant/s : M/s Saket Tiwary
Anurag Singh, Advocates

For the Respondent/s : Mr. Rajeev Ranjan, Advocate

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CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY
CAV JUDGMENT
(Per: HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY)

Date : 31-07-2024

1. The appellant is the wife of the sole respondent. The sole respondent filed an application before the Principal Judge, Family Court, Jamui bearing Matrimonial (Divorce) Case No. 58 of 2017 for dissolution/annulment of the marriage under Section 13 of the Hindu Marriage Act. The appellant was set *ex parte* and an *ex parte* judgment and decree has been passed vide judgment dated 1st December, 2017 and decree dated 14.12.2017 and observed that marriage solemnized between the parties i.e. Sandeep Kumar and Sobha Kumari is hereby dissolved, by decree of divorce in favour of the respondent and the appellant. Further directed that the appellant will not claim against respondent as her husband in future and



there would be no concern of the appellant with the respondent in future.

2. Being aggrieved by the said judgment and decree dated 01.12.2017 and 14.12.2017 respectively passed by the Principal Judge, Family Court, Jamui in Matrimonial (Divorce) Case No. 58 of 2017, the present appeal has been preferred.

3. Heard the rival contentions of the Learned counsel for the appellant as well as the Learned counsel for the respondent. Perused the record.

4. It is an admitted fact that the marriage of the appellant was solemnized with the respondent on 14.12.2015 as per the Hindu rites and customs. It is specific case of the respondent before the trial Court that after marriage the appellant never co-operated to the respondent to co-habit with her inspite of the respondent all endeavour and as such marriage was not consummated. Further contention is that the respondent found that appellant has no vagina, therefore, the appellant is Spado. In the above scenario, the life of the respondent has been defunct and he suffered distress, prayed to grant divorce taking one of the strong ground that appellant as Spado is unable to have physical relationship.



5. The order of trial Court reveal that after due service of notice, through Nazarat as well as by post, the appellant did not appear. Thereafter, paper publication in News Paper was published and inspite of it, the appellant did not appear and therefore, she was set *ex parte*. Later, three witnesses were examined on behalf of the respondent and an *ex parte* decree was passed pursuant to the judgment dated 01.12.2017.

6. It is the contention of the Learned counsel for the appellant that the judgment and decree passed by the Principal Judge, Family Court is in violation of the Principles of Natural Justice. It is also contended that there was no opportunity for the appellant to place her case, as no notice was served upon her and the judgment did not disclose either the date on which the summons were served to the appellant or about the receipt of its service report by the said Court and that the judgment did not even disclose the name of the Newspaper in which notice was published or about its circulation in the locality where the appellant resides. Therefore, the appellant prayed to set aside the judgment and decree dated 01.12.2017 and 14.12.2017 respectively passed by the Principal Judge, Family Court, Jamui in Matrimonial (Divorce) Case No. 58 of



2017.

7. On the other hand, Learned counsel for the respondent contended that inspite of sufficient service of notice and paper publication, the appellant did not appear in Court and was set *ex parte*. It is further contended that there was no error or irregularity in the judgment and, therefore, prayed to dismiss the Miscellaneous Appeal.

8. On the basis of pleadings of the parties, following point is formulated for determination of the present appeal.

(i) Whether summons has been duly served to the appellant or not?"

(ii) Whether the judgment is passed in accordance with Section 13(1) of the Hindu Marriage Act ?

9. On perusal of the judgment impugned, we find that learned trial Court only mentioned "*Summon to the O.P. Sobha Kumari through Nazarat as well as by post were sent, but O.P. did not appear in this case. Later on after publication in daily news paper, when she did not appear in the case, then case was fixed for ex parte hearing against her.*" The judgment of Principal Judge, Family Court, Jamui in Matrimonial (Divorce) Case No. 58 of 2017 neither disclose the



date on which the summons were served to the appellant and about the receipt of its service report i.e. as to on whom the summons were served. Further it does not disclose the name of the Newspaper or discuss its circulation in the locality where the appellant resides.

10. In support of his contention, Learned counsel appearing for the appellant has placed reliance on a judgment dated 09.01.2024 by a Division Bench of this Court passed in **M.A. No. 182 of 2022 (Soni Kumari @ Soni Devi Versus Mantu Kumar @ Mantu Prasad)**.

11. For better appreciation of the facts, relevant paragraphs of the judgment passed in **Soni Kumari (supra)** are quoted hereinbelow:

“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.



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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.”

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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."

The above ratio of the Apex Court read with Co-ordinate Bench decision is squarely applied to the present case on hand and Point No. 1 is answered, considering that Summons/Notice is not duly served on the appellant.

12. On perusal of the impugned judgment, it is evident that the Matrimonial (Divorce) Case No. 58 of 2017 was filed under Section 13 of the Hindu Marriage Act with the prayer to dissolve the marriage between the respondent and the appellant and pass a decree of divorce in favour of the respondent.

13. The ground raised in the Matrimonial (Divorce) Case No. 58 of 2017 by the respondent herein is that the marriage was not consummated as the appellant herein never co-operated to have sexual intercourse with him and that the respondent found that the appellant had no vagina and only she has a way for natural call of urine. If at all the ground raised by the respondent herein before the trial Court is valid, it



must be supported with a medical certificate in order to prove that there is malfunctioning of the organ of the appellant herein. There is no material before the trial Court to prove that the appellant has no vagina. If marriage is not consummated the remedy available for the respondent is to file a petition under Section 12 of the Hindu Marriage Act for annulment of the marriage. Further the petition under Section 12 of the Hindu Marriage Act is only maintainable if it is filed within one year of the marriage. Admittedly, the marriage of appellant with respondent took place on 14.12.2015 and petition under Section 13 of the Hindu Marriage Act is filed on 05.05.2017 i.e. not within the limitation to entertain petition under Section 12 of the Hindu Marriage Act.

14. The record reveals that the petition was filed under Section 13 of the Hindu Marriage Act. The grounds specify in Section 13(a) of the Hindu Marriage Act are as follows:

- i) Adultery
- ii) cruelty
- iii desertion
- iv) conversion to another religion
- v) unsound mind
- vi) suffering from venereal disease in a communicable form leprosy



vii) Renunciation of world

viii) unheard / not heard of as being alive for a period of 7 years

Under Section 13B of the Act, a petition can be filed by both parties for divorce by mutual consent. None of the grounds have been raised by the respondent before the trial Court for decree of divorce on the above-said ground. Therefore, we are of the considerable opinion that the trial Court has not properly appreciated the facts on record and law granting *ex parte* divorce to the respondent herein.

15. After considering the facts and circumstances of this case and materials available on record along with the provisions of the laws laid down, we are of the opinion that it is an *ex parte* judgment/decreed against the appellant herein without following the Principles of Natural Justice and, therefore, it is just necessary to set aside the *ex parte* judgment and decree. Accordingly, the judgment and decree dated 01.12.2017 and 14.12.2017 respectively passed by the Principal Judge, Family Court, Jamui in Matrimonial (Divorce) Case No. 58 of 2017 is set aside. The matter is remitted back to the Principal Judge, Family Court, Jamui for fresh adjudication and thereby the Matrimonial (Divorce) Case No. 58 of 2017 stands restored on the file of Principal Judge,



Family Court, Jamui.

16. Further both parties are directed to appear on 30th August, 2024 before the Principal Judge, Family Court, Jamui and in turn, the Principal Judge, Family Court, Jamui shall receive the written statement of the appellant and further proceed with the trial in accordance with law and shall dispose of the case at the earliest possible time. Respective parties are hereby directed to co-operate in deciding the matter.

17. It is needless to say that this order shall not prejudice the rights of the parties in any manner before the Trial Court.

18. Interlocutory application(s), if any, shall stand disposed of.

19. With the above observations, this appeal stands disposed of.

(G. Anupama Chakravarthy, J)

(P. B. Bajanthri, J)

Spd/-

AFR/NAFR	NAFR
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