

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.651 of 2018

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Ragnipriya, Wife of Narendra Pandit, Resident of Village- Mafi, P.O. and P.S.- Warisaliganj, District- Nawada D/o Late Tarkeshwar Kumar. At present residing at Village- Makhdumpur, P.O. and P.S.- Beur (Anisabad) District- Patna- 800002.

... .. Appellant/s

Versus

Narendra Pandit Son of Arjun Pandit, Resident of Village- Mafi, P.O. and P.S.- Warisaliganj, District- Nawada.

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Prem Ranjan Raj, Adv.

For the Respondent/s : Mr. Nand Kishore Singh, Adv.

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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 : 03-10-2024

Ref:-I.A. No.5557 of 2018

I.A. No.5557/2018 has been filed for condonation of delay of about 307 days in filing M.A. No.651/2018.

2. For the reasons stated in the application read with the affidavit, delay of about 307 days in filing M.A. No.651/2018 stands condoned.

3. Accordingly, I.A. No. 5557/2018 stands allowed.

4. With the consent of the respective counsels M.A. No.651/2018 is taken up for final disposal.

5. The present appeal is directed against the *ex-parte* judgment dated 17.06.2017 passed in Matrimonial Case



No. 197 of 2016 by the Court of Principal Judge, Family Court, Nawada, whereby and whereunder the learned Court has been pleased to allow the application for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955.

6. Briefly stated the fact of case is that marriage of appellant with respondent was solemnized on 06.06.2014 according to Hindu Customs & Rites. After marriage the appellant came to the house of respondent on 07.06.2014 and she remained for one week at her matrimonial house. It is alleged that appellant has not made any physical relation with the respondent and it was bluntly stated by the appellant that she has no any intimacy with respondent and the appellant was taken back from matrimonial house by the brother of appellant. Respondent was not treated well when he reached at Patna for meeting with his wife/appellant and even appellant did not talk in a proper manner on mobile and appellant has no any grievance with the father-in-law and mother-in-law till today and gift was being sent on the occasions according to status and the capacity. When appellant's parents denied the appellant to join her matrimonial house in that context, Panchayati was held and appellant came to matrimonial home for quite sometime and again she went to father's house. Again on the occasion of Holi,



respondent brought appellant and appellant remained for two days at her matrimonial home and again went to her father's house. During course of said intervening period, no physical relation has taken place between appellant and respondent and it was asserted by the appellant that either respondent has to live separately from his parents or to leave the companion of appellant. In other words, there was pre-condition set by the appellant that in case respondent did not seek partition from his parents, in that situation, respondent would leave her companion. Respondent's parents became ready for partition. Again appellant has set another condition that respondent was asked to reside at Patna after selling the property which was apportioned under his share for which respondent was not ready. Respondent was leading her life on the income generated by private tuition whereas the appellant is the teacher of primary school in Bihar Government. Respondent has taken all the efforts but of no avail and in that situation, respondent has brought the said petition.

7. Learned counsel for the appellant has submitted that notice was sent on wrong address provided by the husband/respondent before the court and without having service report, direction for gazette publication has been issued on



18.03.2017. He further submitted that appellant is legally wedded wife of respondent. Appellant is a working lady and she is posted as Panchayat Teacher at Hasanpur Primary School, Patna to secure the source of income for the family and for the bright future and she is residing with her father and mother since 2006. He further submitted that after lapse of few month, conduct of respondent/husband has been changed and he started pressurizing to resign from the service and reside alongwith him at Nawada. Learned counsel for the appellant has further submitted that even without having service report, direction for Gazette Publication has been issued on 18.03.2017. In this way, the judgment passed by the concerned court is without following the cardinal principle of natural justice and the appellant was being deprived of her right of hearing. He further submitted that matrimonial dispute is a very much sensitive dispute for establishing the relation between husband and wife. Appellant got no opportunity to put her reply against the petition filed under Section 9 of the Hindu Marriage Act and the matter has been heard *ex parte* and concerned court has jumped to the conclusion for substituted service without recording the satisfaction that appellant is avoiding the service of notice. No satisfaction is expressed either in a positive way or in a negative



way. In this way, judgment passed by the family court is merely an empty formality to secure the presence of appellant and the appellant has already claimed that respondent has given wrong address knowingly that appellant is residing at Patna and she is government teacher at Patna then the question of sending notice at different address is nothing but to mislead the court. Though, it has been shown that necessary process has been issued for securing the presence of appellant but in reality nothing has been served upon the appellant and ex parte order has been passed without having service of notice. Hence, present M.A. has been filed against the said order.

8. Learned counsel for the respondent has submitted that the concerned Court has passed order on basis of the materials available on record. He further submitted that summons and notices have been issued to the appellant but she ignored the process of the court issued against her. Despite being sufficient service, she did not turn up before the court as she did not want to join the matrimonial home. In this way, order passed by the concerned court is justified and legal. Hence, no interference is needed.

9. Pursuant to the direction of this court dated 29.07.2024 learned counsel for the respondent has produced



complete order sheet of the family court passed in Matrimonial Case No. 197 of 2016 by the Court of Principal Judge, Family Court, Nawada.

10. 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 any observation made by this court might affect the case of either of the parties when matter is retried by the trial court on merit.

11. 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 order-sheet of the matrimonial case. On 17.08.2016 petition under Section 9 was submitted. On 24.11.2016 ordinary and registered notice was directed to be issued. Order sheet dated 09.12.2016, 23.02.2017 and 04.03.2017 indicates that notice has not been served. On 18.03.2017 respondent was directed to take steps for publication by 30.03.2017 and on 21.03.2017 format of the Gazette Publication was submitted. Order sheet dated 18.03.2017 indicates that order has been made for publication in newspaper but there was no satisfaction recorded by the court as



to why the court has taken into account for substituted service as a last resort when the court has not expressed any satisfaction that there is reason to believe that appellant is keeping out of the way for the purpose of avoiding service, for that any other reason, summon cannot be served in ordinary way. Court has also not given any reason as to why court has chosen for substituted service. On 03.05.2017 order of *ex parte* has been initiated without going through material available on record that as to whether notice has been properly served to the appellant or not.

12. 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. The order sheet clearly indicates that steps taken by the concerned court is against the provision of Order 5 Rules 12, 15 and 17 of the Civil Procedure Code. The concerned court has never expressed satisfaction as to why he has jumped to the next process to secure the presence of the parties. Unless and until the court satisfies itself that notice was not properly served, then, in that situation he can pass order for other process which is required to secure the



presence of the party. Whenever the substituted service is required then the court has to give reason for substituted service.

13. 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.

14. 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.

15. 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.

16. 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 on 18.03.2017 the court has directly come to conclusion that publication was required in the present case.

17. 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.

18. In the present case, the learned Principal Judge, Family Court has passed order in a casual and mechanical manner. The order dated 03.05.2017 clearly indicates that case has been fixed for *ex-parte* hearing where order sheets describe regarding how many processes have been exercised for appearance of the appellant but the court has not made any observation about the processes which have been executed under the statutory provisions with the satisfaction of the court. The order sheets only indicate that paraphernalia and the processes have been done to show that all the processes have been exhausted but in reality cited 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. In the said matter, the court should not follow mechanical approach for compliance of issuance of



notice rather the court should take all statutory provisions 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. Though the very matter is related with restitution of conjugal rights but proper hearing of both parties is required so that no one is being unheard about her/him regarding legal representation or rightful hearing.

19. 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 dated 17.06.2017 passed in Matrimonial Case No. 197 of 2016 by the Court of Principal Judge, Family Court, Nawada is set aside. Matrimonial Case No. 197 of 2016 is restored on the file of Principal Judge, Family Court, Nawada. The learned Family Court is directed to pass 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 Case No. 197 of 2016.

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

21. Pending I.A.'s, if any, stands disposed of.

(P. B. Bajanthri, J)

(Alok Kumar Pandey, J)

Amitkumar/
Shahzad

AFR/NAFR	AFR
CAV DATE	24.09.2024
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