

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.606 of 2022

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Rinku Devi @ Rinku Kumari Wife of Santosh Kumar Resident of Village-
Shiv Nagar, P.O.-Habibpur, P.S.-Parwalpur, District-Nalanda, PIN CODE-
801301

... .. Appellant/s

Versus

Santosh Kumar Son of Brahmdeo Prasad Resident of Village and P.O.-
Habibpur, P.S.-Parwalpur, District-Nalanda PIN CODE 801301

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr.Anurag Pandey, Adv.
For the Respondent/s : Mr.Sanjay Prasad, 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 : 10-04-2024

The present appeal is directed against the judgment dated 03.03.2021 and decree dated 08.03.2021 passed in Divorce Case No. 126 of 2011 by the Court of Principal Judge, Family Court, Nalanda at Bihar Sharif whereby marriage between the parties has been dissolved by passing decree of divorce.

2. Briefly stated the facts of appellant's case is that appellant is said to have legally wedded wife of respondent and marriage between both the parties solemnized on 19.06.1996 according to Hindu Rites and Custom at Village-Shiv Nagar, P.S.-Parwalpur, District-Nalanda. It is alleged that



during course of happy conjugal life for eleven years i.e. 1996 to 2007, both parties were blessed with sons, namely, Kundan Kumar and Saurav Ganguli. It is further averred that appellant's husband came in contact with one lady, namely, Sunita Kumari and later, respondent married with Sunita Kumari in the year 2008 and started misbehaving and neglecting with the appellant and also torturing her physically and mentally. It is further averred that respondent changed his address and started living in a rented house at Mohalla-Gandhi Nagar, P.S.-Laheer, District-Nalanda. It is further alleged that appellant requested several times and tried to lead conjugal life with the respondent but of no avail. It is further alleged that appellant filed Maintenance Case No. 34(M)/ 2009 against the respondent which was allowed by order dated 10.04.2012 and respondent was directed to pay Rs. 3,000/- per month to the appellant and said order was modified on 18.07.2018 and respondent was directed to pay Rs. 2,500/- more i.e. total Rs. 5,500/- per month. It is further averred that respondent is a man of means and possesses 13 Bigha agricultural land and he also works as a Developer. It is further alleged that being annoyed by virtue of the order passed in maintenance case, the respondent filed Divorce Suit No. 126 of 2011 against the appellant-wife and obtained ex parte



judgment and decree in his favour by judgment dated 03.03.2021 and decree dated 08.03.2021 by obtaining false and incorrect service report in collusion with process server and the postal peon. It is further alleged that no notice or summon has been served upon the appellant personally and without affording any opportunity to appellant ex parte judgment dated 03.03.2021 and decree dated 08.03.2021 has been passed dissolving the marriage of the appellant. Hence, the present miscellaneous appeal.

3. Learned counsel for the appellant-wife submitted that impugned judgment and decree passed by Principal Judge, Family Court suffers from non compliance of cardinal principle of natural justice as the appellant has not been given opportunity of being heard. Learned counsel further submitted that two service reports clearly establish that no summon/notice has been served upon the appellant and impugned judgment and decree has been passed in absence of knowledge of the appellant. Learned counsel further submitted that so far as publication of notice in gazette is concerned, it has been published in 'Prabhat Khabar' which is not a popular/leading daily newspaper and as such it is not expected from the appellant to read such newspaper. It is further



submitted that it is also incorporated in Civil Procedure Code itself that notice/summon to be published in leading daily newspaper circulated in that particular territorial area.

4. Learned counsel for the respondent submitted that judgment and decree has been passed by the Principal Judge, Family Court by taking all the proper steps from issuing notice to paper publication as per legal requirement but the appellant did not turn up despite being the best effort taken by the court. It is further submitted that respondent has clearly proved the case that appellant-wife has left her matrimonial house without any reasons since the year 2008 and since then she is living separately. It is further submitted that family court came to conclusion that respondent has proved the case on the ground of cruelty, desertion and adultery and judgment is passed on the basis of evidence available on record. Hence, no interference is required.

5. The Principal Judge, Family Court, Nalanda at Bihar Sharif has examined four witnesses on behalf of the respondent. They are AW-1 Santosh Kumar (respondent), AW-2 Subhash Prasad, AW-3 Kundan Kumar and AW-4 Saurav Ganguli, 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 appellant-wife 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. 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 06.08.2011. On 27.02.2012 the Family Court directed to submit necessary requisite for issuance of notice upon the appellant-wife for 23.03.2012. Notice was directed to be issued upon the appellant-wife on 23.03.2012. On 24.01.2018, the court has directed to submit format of publication by 12.03.2018. On 12.03.2018 case was put for *ex parte* hearing against the appellant-wife after paper publication.

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 whispering on any specific date that court has satisfied with the service of notice served upon the appellant-wife. The first order



sheet dated 27.02.2012 clearly indicates that notice was directed to be issued upon the appellant-wife and from the first order sheet dated 27.02.2012 where notice was directed to be issued to the last order sheet dated 12.03.2018 on which case was fixed for *ex parte* hearing, there was no whispering whether the service of notice is satisfactorily served upon the appellant-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.

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 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 the appellant-wife or not and at once on 24.01.2018 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 almost instantly allowed the prayer 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 the order in a casual and mechanical manner. The order sheet dated 12.03.2018 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.

15. 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 03.03.2021 and decree dated 08.03.2021 passed in Divorce Case No. 126 of 2011 by the Court of Principal Judge, Family Court, Nalanda at Bihar Sharif is set aside. Divorce Case No. 126 of 2011 restored on the file of Principal Judge, Family Court, Nalanda at Bihar Sharif. 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 Divorce Case No. 126 of 2011.

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

17. I.A. No. 01 of 2022 is accordingly disposed of.

(P. B. Bajanthri, J)

(Alok Kumar Pandey, J)

shahzad/-

AFR/NAFR	AFR
CAV DATE	04.04.2024
Uploading Date	10.04.2024
Transmission Date	10.04.2024

