

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.656 of 2022

Richa Kumari Wife of Anand Kumar, D/o - Sri Jayant Kumar Singh, resident of village - Islampur Mahnar, P.S. Mahnar, District - Vaishali, presently residing at village- Bhabua Deorhi, presently residing at Mohalla - Gandhi Nagar near Arbindo Ashram, P.S. Rupauli, District - Purnea.

... .. Appellant/s

Versus

Anand Kumar son of Sri Anil Kumar, resident of village - Islampur Mahnar, P.S. Mahnar, District - Vaishali.

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Ram Sumiran Rai, Adv.
For the Respondent/s : Mr.Anand Kumar (In Person)

CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY)

Date : 02-08-2024

The present appeal is directed against the ex parte judgment dated 24.05.2022 and decree dated 06.06.2022 passed in Matrimonial (Divorce) Case No. 264/2017 by the Court of learned Principal Judge, Family Court, Vaishali at Hajipur, whereby and whereunder the learned trial court has allowed the divorce petition filed by the respondent on the ground of desertion, cruelty and adultery.

2. Briefly stated facts of the case is that marriage of appellant and respondent took place on 03.03.2011 and after marriage both started leading conjugal life. It is asserted that



appellant/wife started residing separately since June, 2011. It is further alleged that appellant filed Mahnar P.S. Case No. 129 of 2012 under Sections 498A, 406 of the IPC. It is further averred that since the year 2011, no conjugal relation has been stated to be established between the appellant/wife and respondent/husband. It has been claimed by the respondent that earlier Divorce Case No. 221 of 2013 has been withdrawn which was filed on account of non-cooperative attitude of the appellant for leading conjugal life. The appellant filed several cases against the family members of the respondent on the basis of wrong and fabricated facts. The appellant was mentally ill and she has been treated at Ranchi and because of mental illness, she became aggressive and the respondent has levelled the allegation of cruelty, desertion and adultery against the appellant. It is further alleged that appellant did not appear even after service of notice.

3. Learned counsel for the appellant submitted that impugned judgment and decree has been passed in Matrimonial (Divorce) Case No. 264 of 2017 in most casual and perfunctory manner against the weightage of evidence and thus is unsustainable and the same is without having spirit of law. Learned counsel further submitted that respondent has falsely



alleged several allegation against the appellant and thereafter learned Family Court issued notice to the appellant but respondent has mentioned wrong address in the envelope as Anant Kumar Singh, resident of village-Behab Deorhi, P.S. Supaul, District-Purnea in place of Bhabua Deorhi, P.S. Rupauli, District-Purnea and accordingly, notice was not served upon the appellant because address of the appellant has wrongly been mentioned by the respondent-husband with malice intention. Learned counsel further submitted that Family Court without giving opportunity of hearing, the appellant proceeded to initiate ex parte proceeding. Learned counsel further submitted that impugned judgment reveals that during course of ex parte hearing, three witnesses have been examined on behalf of the respondent/husband. They are PW-1/respondent-husband himself, PW-2/Abhishek Kumar and PW-3/Anil Kumar Singh (father of the respondent). Learned counsel further submitted that impugned judgment has been passed on the ground of desertion, cruelty and adultery but the said ingredients have not been supported by the deposition of witnesses and without giving proper opportunity for contesting the case, matrimonial dispute should not be adjudicated and no witness has been



produced on behalf of the appellant. There is nothing on record to prove the ground of cruelty, desertion and adultery.

4. 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-Richa Kumari and the same needs 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.

5. On 11.12.2017 order was passed to issue notice by speed post. Order sheet dated 28.03.2018 indicates that notice has already been issued and order sheet dated 28.05.2018 indicates that case was posted for submitting the compliance report on 16.07.2018. Previous order sheet dated 28.05.2018 indicates that compliance report is required on 16.07.2018 but there is no specific mention of compliance of previous order and again on 16.07.2018 speed post notice was ordered to be issued. On 05.12.2018 court jumped to the conclusion that publication is required and order sheets dated 16.02.2019, 02.05.2019, 16.07.2018 and 13.09.2018 are overlapping to one another. There is no specific direction that as to whether the court has satisfied that service of notice served upon the appellant. Order



sheet dated 05.12.2018 indicates that gazettee publication was allowed but there was no satisfaction recorded by the court as to why the court has taken into account substituted service as a last resort when the court has not expressed any satisfaction that there is reason to believe that the appellant 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 has also not given any reason as to why the court has chosen for substituted service. From perusal of order sheet dated 02.02.2021, it is crystal clear that the case was fixed for ex parte hearing against the appellant. Though the process initiates from 11.12.2017 and finally the publication was ordered on 05.12.2018. On 02.02.2021 the court has jumped to the conclusion that notice issued to the appellant has been properly served but on 02.02.2021 Covid-19 was in its peak which is globally known to all. Order sheets of different dates of Family Court regarding service of speed post notice indicate that how casually and in a routine manner order has been passed and there is no whisper on any specific date that court has 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.

6. 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 instantly jumped to the conclusion without recording the satisfaction about the prerequisites for exercise of power under Order 5 Rule 20 of the Code.

7. In the present case, learned Principal Judge, Family Court has passed the order in a casual and mechanical manner. The order sheet dated 02.02.2021 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 provision 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 the 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. Order of ex parte hearing was passed on 02.02.2021 by the concerned court and it is globally known to all that it was the peak period of Covid-19 and during Covid-19, the concerned court has passed order for ex parte hearing in



a casual and routine manner without going into sensitiveness of the case which is related to the matrimonial life of both parties. During Covid-19 all the human activities had come to halt. 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 Civil Procedure Code regarding issuance of summon for appearance of the party.

8. Having regard to the facts and circumstances of the case, we are satisfied that appellant-Richa Kumari was not duly served with the notice and the procedure adopted for directing substituted service being vitiated, therefore, ex-parte judgment passed against the appellant-Richa Kumari deserves to be set aside. Accordingly, judgment dated 24.05.2022 and decree dated 06.06.2022 passed in Matrimonial (Divorce) Case No. 264/2017 by the Court of Principal Judge, Family Court, Vaishali at Hajipur, is set aside. Matrimonial (Divorce) Case No. 264/2017



restored on the file of Principal Judge, Family Court, Vaishali at Hajipur. The matter is remitted back to the 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 Matrimonial (Divorce) Case No. 264/2017.

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

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

(P. B. Bajanthri, J)

(Alok Kumar Pandey, J)

shahzad/
amitkumar

AFR/NAFR	AFR
CAV DATE	25.07.2024
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