

AD- 9
Ct No.16
13.02.2025
(SSS)

FMA 762 of 2022

Tapasree Dasgupta
Vs.
Samir Dasgupta

Mr. Saptarshi Roy,
Mr. Siddhartha Roy

....For the Appellant.

Mr. Partha Pratim Roy,
Mr. Rahul Karmakar,
Mr. Sourav Guchhait

...For the Respondent.

1. Heard learned Counsel for the parties.
2. The present appeal has been preferred against an order whereby the application of the appellant/wife under Order IX Rule 13 of the Code of Civil Procedure was dismissed. The said application arose out of a divorce suit filed by the respondent/husband against the appellant/wife, in which he obtained an ex parte decree on April 29, 2011. The application under Order IX Rule 13 of the Code was filed by the appellant/wife for restoration of the said suit. The said application was ultimately dismissed on contest, giving rise to the present appeal.

3. Learned Counsel appearing for the appellant argues that the learned Trial Judge erred in law and failed to advert to the relevant provisions of law and the evidence on record in dismissing the application for restoration of the suit.

4. It is contended that the procedure for substituted service as contemplated under Rules 17 to 20 of Order V of the Code of Civil Procedure was not complied with in the present case in respect of the suit. As such, the ex parte decree is vitiated by palpable violation of the said provisions.

5. Drawing the attention of the court to Order No. 2 dated February 24, 2011 passed in the suit, it is pointed out that as per the finding of the learned Trial Judge, it appeared from the report of the process server that the summons of the suit were not properly served. Although the postal envelope sent to the appellant/wife apparently came back with the endorsement "refused", the mandate of Rule 17 of Order V of the Code is that even in such cases, the successive provisions for substituted service under Rules 18 to 20 have to be complied with.

6. In the present case, the process server was not examined at all in the suit to establish proper service of summons on the defendant/wife. Only after eight years, that too, at the instigation of the appellant/wife in the proceeding under Order IX Rule

13, was a person called from the postal department, who was only deputed to adduce evidence. The said person could not have had direct knowledge of the factum of service of summons on the appellant and as such, was an incompetent witness to prove proper service of summons on the appellant.

7. Learned Counsel for the appellant next argues that the husband himself, in the divorce petition, had mentioned two addresses of the appellant/wife, who was the defendant therein. One of the said addresses was of the parental home of the appellant/wife and the other, the official residence of the husband at Haldia, where the wife also resided from time to time. No service at all was effected at the parental home of the defendant, that is, the present appellant; as such, it cannot be said that due service of summons was effected at all.

8. Insofar as the service purportedly effected at the Haldia address is concerned, it is argued that the appellant/wife never received the summons. The respondent/husband, it is alleged, was capable of managing the endorsement on the envelope, since he was also residing at the same address at the relevant point of time.

9. Learned Counsel next argues that the knowledge of the suit, even if the appellant could be assumed to have the same, does not tantamount to

knowledge of the date of ex parte hearing. Hence, the learned Trial Judge committed a palpable error of law on such count as well, since even if it was to be presumed by the learned Trial Judge that summons of the suit were duly served on the appellant, nothing was produced before the court below to attribute knowledge of the date of hearing of the suit to the appellant.

10. Thirdly, it is contended by the appellant that the respondent/husband contracted a remarriage within two months of the ex parte divorce decree, which is in stark contravention of Section 30 of the Special Marriage Act, which debars a party from contracting a second marriage within the statutory limitation period of filing an appeal. Thus, the said remarriage of the husband, which played in the mind of the learned Trial Judge, as reflected in the impugned order, could not be a relevant yardstick for adjudicating the Order IX Rule 13 application at all. It is submitted that the respondent/husband cannot be permitted to take advantage of his own wrong by remarrying during the statutory appeal period.

11. Learned Counsel further argues that there are palpable contradictions in the evidence of the husband, adduced in connection with the proceeding under Order IX Rule 13 of the Code of Civil Procedure.

12. Learned Counsel for the appellant cites *Sushil Kumar Sabharwal vs. Gurpreet Singh and Ors.* reported at (2002) 5 SCC 377 for the proposition that the provisions contained in Order IX Rule 6 of the Code of Civil Procedure contemplate three situations - when summons are duly served, when not duly served and when summons are served but not in due time. Even when it is proved that the summons are duly served, the provision, according to the Supreme Court, casts an obligation on the court and simultaneously invokes a call to the conscience of the court to feel satisfied in the sense of being “proved” that the summons were duly served when and when alone the court is conferred with a discretion to make an order that the suit be heard ex parte. Any default or casual approach on the part of the court, it was held, may result in depriving a person of his valuable right to participate in the hearing and may result in the defendant’s suffering an ex parte decree or proceedings in the suit wherein he was deprived of hearing for no fault of his.

13. Thus, it is contended that the impugned order ought to be set aside and the suit restored, giving an opportunity to the appellant/wife to properly contest the suit, which she was deprived of.

14. Learned Counsel appearing for the respondent/husband, on the other hand, places

reliance on the provisions of Order V Rule 9 of the Code of Civil Procedure. In terms of sub-rule (4) of Order 9, where a defendant resides out of the jurisdiction of the court in which the suit is instituted and the court directs service of summons on that defendant, the summons may be served by such mode of service as referred to in sub-rule (3) except by registered post with acknowledgement due, wherein the provisions of Rule 21 shall not apply. Sub-rule (3) contemplates service of summons to be made by delivering or transmitting a copy thereof by registered post with acknowledgment due addressed to the defendant or his agent empowered to accept the service or by speed post or by courier service as are approved by the High Court or by the court referred to in sub-rule (1) of Rule 9 or by any other means of transmission of documents provided by the rules made by the High Court.

15. Learned Counsel points out that by the very first order passed in the divorce suit, requisites were directed to be filed along with fees and service of summons was directed to be effected both ways, that is, both through the court and directly by postal service.

16. Seen from such perspective, it is argued that Order No. 2 dated February 24, 2011 passed in the suit merely records that although the summons were

not properly served through court by the process server, the postal envelope sent otherwise was received with an endorsement of the postal peon "refused".

17. Hence, in view of service being effected by such alternative mode, sub-rule (5) of Rule 9 comes into play which provides that when an acknowledgment or any other receipt purporting to be signed by the defendant 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 authorized by the courier service to the effect that the defendant 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. The proviso thereto stipulates that where summons were properly addressed, prepaid and duly sent by registered post with acknowledgment due, the declaration referred to in the sub-rule shall be made notwithstanding the fact that the acknowledgment has been lost or mislaid or for any other reason has not been received by the court within 30 days from the date of issue of summons. Thus, it is argued that

the provisions of Rules 17 to 20 of Order V are not attracted in the present case at all.

18. Learned Counsel for the respondent/husband next argues that the concerned authorized person from the postal department was summoned as a witness in connection with the proceeding under Order IX Rule 13 of the Code of Civil Procedure and duly affirmed the fact that the movement of the envelope between Haldia Township and RMS Howrah was borne out by the records, which also goes on to show that proper service was effected on the appellant/wife.

19. Learned Counsel for the respondent cites *P.T. Thomas vs. Thomas Job* reported at (2005) 6 SCC 478, where it was held by the Supreme Court that if in the notice issued, the postman has made an endorsement, there is a presumption of correctness in law under Section 114 of the Evidence Act.

20. It is further pointed out by learned Counsel for the respondent that the appellant/wife has consistently, both in her application under Order IX Rule 13 of the Code of Civil Procedure and in her cross-examination, has admitted to have been residing at Haldia, where the summons were served.

21. Learned Counsel also places much stress on the relevant statement of the wife in her cross-examination to the effect that she has a female child

of 17 years and the said daughter has been a student and studying at Haldia since her childhood. It is argued that the said statement also goes on to show that the wife, at the relevant juncture, was very much residing in Haldia and not at her parental home elsewhere.

22. Upon hearing learned Counsel for the parties, we find from the records that the learned Trial Judge, vide Order No. 2 dated February 24, 2011, had not held that the summons had not been properly served but only recorded that it appeared from the report of the process server that the summons served through court were not properly served. In the same breath, in the very next sentence, the learned Trial Judge recorded that the postal envelope sent otherwise had returned with the endorsement of the postal peon “refused”, which was construed to be good service by the learned Trial Judge and the ex parte hearing of the suit was fixed.

23. The contention of the respondent/husband is further corroborated by the preceding order dated January 6, 2011 passed in the suit, which indicates that summons were directed to be served both ways, that is both through court and directly via postal service. Hence, although one of the modes of service (through court) failed, the other mode succeeded, since the endorsement “refused” indicates good

service, which is clearly borne out by the provisions of Order V Rule 9(5) of the Code of Civil Procedure as well.

24. The principle laid down by the Supreme Court in the judgment of *P.T. Thomas (supra)* is also applicable in such context and as such, a presumption of correctness of the official act of postal service arises, which was accepted by the learned Trial Judge while deciding the application under Order IX Rule 13 of the Code of Civil Procedure.

25. In view of proper service of summons having been effected in the opinion of the learned Trial Judge as well as within the contemplation of Order V Rule 9(5) of the Code of Civil Procedure, it is rightly argued by the respondent that the subsequent provisions of substituted service between Rules 17 and 20 of Order V are not attracted in the present case at all, thereby mitigating the necessity of examining the process server in person or taking steps for further substituted service.

26. As to the other argument made by the appellant, regarding the appellant not having knowledge of the ex parte hearing of the suit, the argument of the respondent on such count are germane as well. Order IX Rule 13 has two components – first, if the summons of the suit is not duly served at all and secondly, if the defendant was

prevented by any sufficient cause from appearing when the suit was called on for hearing.

27. In respect of the first scenario, it would suffice if the provisions of Order V Rule 9 were complied with, which would not necessitate any further proof attributing the knowledge of the date of actual hearing of the suit to the defendant.

28. Only in the event summons were served and the defendant had appeared initially in the suit, but subsequently failed to appear for some reason, the question of proving the knowledge of the defendant as to the actual date of ex parte hearing would arise.

29. It being the consistent case of the appellant/wife here that the summons of the suit were not served at all on her, the first limb of Order IX Rule 13 is applicable and the proof of sufficient service of summons on the defendant/appellant is sufficient.

30. Also, the learned Trial Judge correctly relied on the second proviso to Order IX Rule 13 of the Code inasmuch as no court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff on the case claimed.

31. In the present case, the learned Trial Judge was satisfied at two stages of the sufficiency of service of summons on the wife. First, when the suit was fixed on the ex parte board by the Order dated February 24, 2011 and secondly, when the Order IX Rule 13 application was adjudicated by the learned Trial Judge.

32. The said proposition of the respondent regarding proper service having been effected having thus passed muster twice before the learned Trial Judge, we, sitting in appeal, do not find any reason to substitute our view for that of the learned trial Judge even if an alternative view was possible on the facts of the case.

33. With regard to the remarriage of the husband within the statutory limitation period for appeal, unfortunately, although Section 30 prohibits a successful plaintiff in a divorce suit from contracting such remarriage within the statutory appeal period, the said provision does not have any sanction and is, as such, toothless in the sense that the plaintiff cannot be penalized in any manner for having contracted such marriage. There is no provision whatsoever within the four corners of the Special Marriage Act regarding any sanction or penal provision to be imposed on a plaintiff who has

contracted remarriage within the statutory appeal period after obtaining an ex parte divorce decree.

34. That apart, we also do not find that either Section 24 or Section 25 of the Special Marriage Act, which respectively provide the parameters for declaration of a marriage as void and voidable, contain any provision to declare a second marriage either void or voidable in case it is contracted by one of the parties to a divorce suit within the statutory period of appeal.

35. Hence, the second marriage of the respondent/husband, even if it could be termed as “irregular” in the sense of being violative of the spirit of Section 30 of the Special Marriage Act, cannot be said to be illegal, unlawful, void or voidable under any provision of any statute in India.

36. Hence, the learned Trial Judge cannot be said to have erred in law in relying on such human aspect of the matter, considering the effect of allowing the Order IX Rule 13 application on at least two innocent lives, that is, the second wife of the respondent/husband and the child born of the said second wedlock.

37. Insofar as the evidence in connection with the Order IX Rule 13 proceeding is concerned, we find therefrom that the appellant/wife has consistently stated both in her application under Order IX Rule 13

itself as well as in her examination-in-chief that she is a resident of Haldia township, at the very address where the summons was alleged to have been refused. In her cross-examination, the appellant/wife admits that the address as mentioned in her affidavit is the place of her residence. Moreover, the appellant/wife was confronted with the returned envelope with the endorsement “refused”, which was the genesis of the entire conundrum, and when posed with a counter suggestion, she admitted that the address as mentioned in the said envelope was correctly written. In fact, on such admission, the address portion of the envelope was marked as Exhibit-A in the proceeding under Order IX Rule 13 of the Code of Civil Procedure.

38. Hence, it cannot be gainsaid that there is sufficient reason to presume that the appellant/wife was present at the relevant juncture and residing at the address where the summons was sent, which ultimately returned with the endorsement “refused”, which is good service not only as per the General Clauses Act as well as the judgment in *P.T. Thomas (supra)* but also Order V Rule 9(5) of the Code of Civil Procedure.

39. Insofar as the judgment of *Sushil Kumar Sabharwal (supra)*, cited by the appellant/wife, is concerned, in the said case, the Supreme Court was

considering the second proviso to Order IX Rule 13 of the Code of Civil Procedure. However, in the facts of the said case, it was considered by the Supreme Court that the service of summons was not proved to have been duly effected.

40. However, the rigours of service of summons through courts is somewhat alleviated in respect of the alternative mode of service as contemplated in Order V of the Code of Civil Procedure, that is, direct postal service. In case of the latter, the necessity of examining the process server is completely waived in view of the provisions of the Code itself, and as such, the proposition laid down in the said judgment cannot be borrowed in the present case.

41. Moreover, the dispute in the case of *Sushil Kumar Sabharwal (supra)* arose from a landlord-tenant litigation and was delivered in the context of the facts and circumstances of the said case. In paragraph No. 8 of the said judgment, the Supreme Court narrated several infirmities such as on the alleged refusal by the defendant either the process server did not affix the copy of the summons as the plaintiff claimed on the wall or if he claimed to have done so, then the endorsement made by the process server on the back of the summons did not support him. Such contradictions apart, it was also observed that the tendering of the summons, its refusal and

affixation of summons and copy of the plaint on the wall should have been witnessed by persons who identified the defendant. In the present case, such provisions are not attracted for the reasons as given above, as we are not speaking of a scenario where Rules 17 and 20 of Order V of the Code are applicable and/or the service of summons through the court's process is being spoken of.

42. Hence, we are unable to convince ourselves that the ratio laid down in *Sushil Kumar Sabharwal (supra)* is attracted to the present case at all.

43. In view of the above discussions, we are of the considered opinion that the learned Trial Judge was justified in dismissing the application of the appellant/wife under Order IX Rule 13 of the Code of Civil Procedure. Accordingly, the present appeal fails.

44. FMA 762 of 2022 is dismissed on contest, thereby affirming the judgment and order dated March 16, 2022 passed in Miscellaneous Case No. 57 of 2011 by the learned Additional District Judge, Fast Track Court II at Howrah, District - Howrah.

45. CAN 2 of 2024 is also disposed of in the light of the above observations.

46. No order as to costs.

(Sabyasachi Bhattacharyya, J.)

(Uday Kumar, J.)