

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION***

FAMILY COURT APPEAL NO.10 OF 2024

Dr. Prerana Rajendra Aher
Age about 37 years, Occ: Doctor
R/o: 59, Shivram Nagar, Basmat Road
Behind Agrawal Mangal Karyalaya
Parbhani
Tq and Dist Parbhani

...Appellant
(Ori. Opponent)

Versus

Dr. Rajendra Bhausahab Aher
Age 41 years, Occ: Doctor
R/o: 1, Sheetal Apartments
Pumping Station Road
Gangapur Road, Nashik
Dist : Nashik

...Respondent
(Orig. Petitioner)

Mr. Jaydeep Deo for the Appellant.

Mr. Satyajeet P. Dighe, for the Respondent.

***CORAM: BHARATI DANGRE &
MANJUSHA DESHPANDE, JJ.***

DATE : 17th APRIL 2026

JUDGMENT (Per Manjusha Deshpande, J.):

1. This appeal arises out of the judgment dated 14th October 2021, whereby the petition filed by the respondent-husband has been allowed and the marriage between the appellant and the respondent is

dissolved by decree of divorce under Section 13(1)(ia) of the Hindu Marriage Act, 1955.

2. The appellant is primarily aggrieved by the *ex parte* grant of decree of divorce as she has been deprived to resist the prayer of the husband before the Family Court. Hence, this appeal against grant of *ex parte* decree of divorce. Although the decree of divorce has been granted by the Family Court vide Judgment and Order dated 14th October 2021, when the wife has approached this Court, this Court vide its order dated 6th October 2022, has granted stay to the execution of the said judgment and order.

3. Learned advocate for the appellant submits that the marriage between the parties was solemnized on 21st November 2016, within 7-8 months the appellant has been driven out of their house at Jodhpur. When the father of the appellant expired, the parties decided to resume cohabitation, accordingly, they started residing together. Again in April 2018, the respondent-husband had taken a job at

Guwahati, Assam, the appellant also accompanied him at Guwahati, however, within a month the respondent deserted her at Guwahati and returned to Nashik. It is on this background the appellant filed Domestic Violence ('D.V.') proceedings against the husband before the Judicial Magistrate, First Class, Parbhani on 14th August 2018. She also filed an application for interim maintenance before the Court of the learned Judicial Magistrate, First Class, Parbhani, on 22nd April 2019, wherein she has been granted Rs.50,000/- per month towards maintenance, during the pendency of her application under Protection of Women from Domestic Violence Act, 2005 ('PWDVA'). This order of the Judicial Magistrate, First Class, Parbhani has been stayed by the Sessions Court, Parbhani subject to condition that till the disposal of the case the respondent-husband shall pay an amount of Rs.25,000/- per month to the appellant-wife.

4. During the pendency of the proceedings filed by the appellant at Parbhani, the respondent filed a petition for divorce being Petition No.A-417 of 2019 before the Family Court, Nashik on the

ground of cruelty and desertion. The learned advocate submits that, this petition for divorce has been granted *ex parte* without affording any opportunity to defend to the appellant. It is contended that the summons in the proceedings for divorce was never served on the appellant. She got knowledge about impugned judgment and decree only when the respondent has filed an application in the Appeal under the D.V. Act pending before the Sessions Judge, Parbhani raising challenge to the order passed below Exhibit-5 in the D.V. Application No.100 of 2018. In that application there is an averment made by the respondent that the marriage between the appellant and the respondent has been dissolved on 14th October 2021, by the Family Court Nashik in Petition No.A-417 of 2019.

5. No sooner the appellant came to know about the order passed by the Family Court she obtained certified copy of the order and upon going through the same, she found that the summons issued by the Family Court by RPAD Post had returned 'unclaimed' and based on the said remark conclusion is drawn by the learned Judge of the

Family Court, Nashik, that the summons was served on the appellant. Our attention is drawn to the postal acknowledgment placed on record which discloses that in the first attempt the postal department tried to serve the summons on 12th December 2019, but could not serve, therefore it returned with endorsement 'intimation given'. Even on 14th December 2019, service had failed and endorsement was made 'second intimation'. In the third attempt the envelope returned with an endorsement dated 19th December 2019, as 'unclaimed'.

6. It is submitted that since there was no proper service on the appellant, it was not appropriate on the part of the Family Court to proceed with the divorce petition *ex parte*. The learned advocate submitted that this order of the Family Court is contrary to the provisions of Code of Civil Procedure, 1908 ('CPC'). The procedure for issuing summons is provided under Order V, Rule 9 and Rule 21 of the C.P.C. Without following the proper procedure for serving summons, an *ex parte* order has been passed, which is required to be quashed and set aside, so as to afford an opportunity to the appellant

to resist the Hindu Marriage Petition by granting an opportunity to lead evidence.

The appellant in this regard relied on the decision of this Court in the case of ***Udhav Baliram Adawale v/s Babruwan Papanarsh Gaikwad¹***, where in similar circumstances when the decree was passed *ex parte* after the summons issued, returned with remark ‘unclaimed’, it is held that presumption under Section 27 of the General Clauses Act and 114 of Evidence Act cannot be invoked to hold that service effected in such manner is a good service, resultantly recalling the *ex parte* decree.

7. Per Contra the learned advocate for the respondent has opposed the appeal by contending that, although the respondent was duly served with the summons, she had failed to cause appearance therefore the petition was proceeded *ex parte* against the appellant. Infact she has avoided the service of notice, so that she can continue to draw the maintenance granted to her in the D.V. proceedings. It is submitted that the appellant has made false and baseless allegations

1 2017 SCC OnLine Bom 6865

against the respondent. Appellant is more interested in extracting money from the respondent. It is because of her conduct and harassment, the respondent is constrained to file Petition for dissolution of marriage. The respondent has filed his affidavit of evidence and the contents of his affidavit have gone untraversed. Therefore, the learned Judge of the Family Court has rightly passed the order dissolving marriage between the parties. Considering that the appellant herself has avoided the service of notice, therefore, no interference is warranted in the appeal.

In support of his submission he relies on the order passed by the Registrar, Supreme Court of India, H. Shashidhara Shetty in Transfer Petition(s) (Civil) No.(s) 2090 of 2019 holding that the word ‘refusal’ can be interpreted as synonymous to the word ‘unclaimed’. Referring to an earlier Supreme Court decision in case of *Ajeet Seeds Limited v/s K. Gopala Krishnaiah*², wherein it is held that, when notice is served on proper address it shall be deemed to be served unless contrary is proved.

2 (2014) 12 SCC 685

8. We have heard the respective parties and perused the record. Without going into the merits of the impugned judgment and about the allegations made by the respondent against the appellant and the allegations of cruelty made by him, the preliminary issue that needs to be addressed is whether the appellant can be said to be served with the summons issued by the Family Court.

Order V of C.P.C. provides Issue and Service of Summons. Rule 9 provides for the modalities in Issuing and Serving of Summons. Rule 9(5) provides the manner in which Summons can be delivered or transmitted by registered post acknowledgment, as was done in the present case. Rule 9(5) reads thus:-

“9. Delivery of summons by Court.-

.....

(5) When an acknowledgment or any other receipt purporting to be signed by the defendant or his agent 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 authorised by the courier service to the effect that the defendant or his agent 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:

Provided that where the summons was properly addressed, pre-paid and duly sent by registered post acknowledgment due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of issue of summons.”

9. Order V, Rule 17 of CPC provides that in case the defendant or his agents refuses to sign the acknowledgment and he is not likely to be found at his residence within a reasonable time, the serving officer is at liberty to 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, and then shall return the original to the Court from which it was issued with a report annexed to it.

It is further provided in Rule 19 that where a summons is returned under Rule 17, the Court shall, if the return of summons under that Rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer

on oath, or cause him to be so examined by another Court, in order to verify that the summons has been duly served.

10. In case the Court is of the opinion that the defendant is avoiding the service, this contingency is taken care in Order V, Rule 20. It is provided that if the Court is satisfied that defendant is avoiding service, the Court shall order the summons to be served by affixing a copy on the conspicuous place in the Court-house, and also upon part of his house where defendant last resided, even a substituted service by issuing advertisement in the daily newspapers widely circulated in the local area where the defendant last resided is permitted and it is held to be a due service.

11. In the present case, while passing the impugned order the learned Judge has totally disregarded the procedure for issuance and service of summons. The learned Judge has not bothered to ensure whether the summons was issued on the last known address of the appellant. The only observation made by the learned Judge of the

Family Court is that respondent is duly served with the summons but has failed to appear before the Court, thereafter the learned Judge, has proceeded to pass an *ex parte* judgment granting decree of divorce. The decree of divorce has been granted since the grounds raised by the respondent-husband in his affidavit of evidence has gone untraversed. This order granting a decree of divorce has resulted in severing the matrimonial ties of the parties forever, without affording any opportunity to the appellant, which has caused grave injustice to her.

According to the averment made by the appellant, she came to know about the decree of divorce when an averment is made in the Appeal filed before the Sessions Court, Parbhani, against the order in the D.V. Application, passed by the Judicial Magistrate First Class, Parbhani. Whereas the proceeding for divorce has been filed at Nashik due to which she did not have any knowledge about filing of divorce proceedings.

12. Upon perusal of the impugned order, it is evident that the decree has been passed *ex parte* without hearing the appellant thereby

depriving her of her legitimate right to defend. Even from the postal acknowledgment placed on record, it appears that twice the summons has been returned after due intimation and on the third occasion it has been returned with the endorsement as ‘unclaimed’ which cannot be treated as a proper service. If at all the Court was of the opinion that the petitioner is purposely avoiding the notice, the Court should have served the appellant by following the procedure under Order V, Rule 20 as referred hereinabove by way of substituted service. In this context we may profitably refer to the observations made by the Hon’ble Supreme Court in a similar situation in the case of ***Neerja Realtors Private Limited v/s Janglu (Dead) Through Legal Representative***³. The relevant part of the said judgment, is reproduced hereinunder:-

“14. Evidently as the report of the bailiff indicates, he was unable to find the defendant at the address which was mentioned in the summons. The report of the bailiff does not indicate that the summons were affixed on a conspicuous part of the house, at the address mentioned in the summons. There was a breach of the provisions of Order 5 Rule 17. When the application for substituted service was filed before the trial court under Order 5 Rule 20, a cryptic order was passed on

3 (2018) 2 SCC 649

2-9-2011. Order 5 Rule 20 requires the court to be satisfied either 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. Substituted service is an exception to the normal mode of service. The Court must apply its mind to the requirements of Order 5 Rule 20 and its order must indicate due consideration of the provisions contained in it. Evidently the trial court failed to apply its mind to the requirements of Order 5 Rule 20 and passed a mechanical order. Besides this, as observed by the learned Single Judge of the High Court, the trial Judge ignored the provisions contained in Chapter III of the Civil Manual issued by the High Court on its appellate side for the guidance of civil courts and officers subordinate to it. Paras 33 to 36 of Chapter III are extracted below:

“33. In addition to the service to be effected through a bailiff, a summon may also be sent to the defendant, to the address given by the plaintiff, by registered post, prepaid for acknowledgment, provided there is a regular daily postal service at such place.

34. Rules as to service of summons are contained in Rules 9 to 30 of Order 5. Care should be taken to see that bailiffs follow those rules as well as the instructions given in the bailiffs’ Manual.

35. It is the duty of the serving officer to follow the procedure and take all the steps laid down in Rule 17 of Order 5. He has no discretion for not taking the necessary steps, when the conditions laid down in the said Rule are fulfilled.

36. It is for the Court to determine whether the service is good or bad. In determining whether the service is good or not, the attention of courts is drawn to the necessity of strictly following the provisions of the Civil Procedure Code as to the service of processes. Ordinarily, service should not be considered sufficient unless all the requirements of the law in that behalf are fulfilled. The object of the service is to inform a party of the proceedings in due time. When from the return of a serving officer it appears that there is no likelihood that a process will come to the knowledge of the party in due time, or a probability exists that it will not so come to his knowledge, the service should not be considered to be proper. The law contemplates that the primary method of service should be tendering or delivering a copy of the process to the party personally, in case in which it may be practicable to do so. It is the duty of the serving officer to make all proper efforts to find the party, with a view to effect personal service. If it be not possible after reasonable endeavour to find the party, then only the service may be made on an adult male member of the family residing with him.”

13. After considering the case of the appellant and the order impugned, we find that the learned Judge of the Family Court has committed a grave error by failing to ascertain proper service of summons on the appellant, which has resulted in passing the impugned

judgment, without affording any opportunity to the appellant to defend her case. Thus in our view, the matter needs to be remanded to the Family Court for fresh consideration and disposal, by granting an opportunity to the appellant to lead evidence. Thus, the impugned judgment dated 14th October 2021 passed by the Judge, Family Court, Nashik in Petition No.A-417 of 2019, is quashed and set aside. The Family Court, Nashik, is directed to fix an appropriate date of hearing as per the convenience of the parties and shall make an endeavour to dispose of the petition as early as possible.

The Appeal stands disposed of in above terms.

MANJUSHA DESHPANDE, J.

BHARATI DANGRE, J.