

Court No. - 34

Case :- FIRST APPEAL No. - 431 of 2007

Petitioner :- Smt. Dolly Kumar

Respondent :- Jitendra Kumar, Executive Engg. U.P.P.C.L.

Petitioner Counsel :- M.K. Gupta

Respondent Counsel :- Aklank Jain

Hon'ble Prakash Krishna,J.

Hon'ble Arvind Kumar Tripathi (II),J.

This appeal under Section 19 of the Family Courts Act, 1984 is at the instance of wife against the judgment and order dated 7th November, 2007 passed by Family Court, Agra in Misc. Case No. 10 of 1996 whereby application filed by wife under Order IX Rule 13 of C.P.C. to set aside an ex parte decree dated 6th February, 2006 passed in Original Suit No. 693 of 2005 has been dismissed.

Heard Shri M.K. Gupta, learned counsel for the appellant and Shri Aklank Jain, learned counsel for the respondent.

The husband-respondent herein instituted a divorce petition against his wife who is appellant and obtained the ex parte decree. To set aside the said ex parte decree, wife filed an application under Order IX Rule 13 of C.P.C. with the allegations that she has always been residing in her matrimonial house at Agra. On 20th February, 2006, brother Vinod Kumar came to Agra when he received a copy of judgment dated 6th February, 2006 through ordinary post. Only then, she came to know about passing of the ex parte decree. It was further stated that to mislead the Court the plaintiff wrongly mentioned alias against the name of the defendant-wife as Cann. She never used alias and has been residing with husband at matrimonial house no. 175 West Arjun Nagar, Agra. She never refused to receive any notice or summon of the court. The husband got the service affected by giving her address at Delhi. The service was affected through publication in a newspaper which has no circulation at any place. In support of her case, her brother filed an affidavit.

The husband contested the application for setting aside the ex parte decree on the ground that the defendant-wife was validly served and there was no foul play in the service of notice on her. The service of notice was affected through

publication in newspaper as she refused to accept the notice through process server.

The court below by a short order dismissed the application and refused to set aside the ex parte decree on the premises that on 18th January, 2006 order to proceed ex parte was passed and the service through publication dated 3rd January, 2006 was deemed sufficient service. The notice was published in 'STATESMAN' newspaper which has circulation in Delhi and is of good standard. In other words, service of notice was held sufficient on the basis of publication of the notice in the newspaper.

Learned counsel for the appellant submits that service through publication is weakest mode of service and it should not be resorted to in a routine manner. Attention of the court was invited towards copy of order-sheet to show that the suit was instituted on 16th September, 2005 and the notice fixing 30th October, 2005 was ordered which happened to be holiday. On 31st October, 2005 the plaintiff was directed to take steps within seven days fixing 24th December, 2005. On 24th December, 2005, the application and affidavit for publication was filed by the husband and the court permitted the service of notice through publication. He submits that the petition was decided in great haste. There is nothing in the order-sheet to show that the notice was sent and served on the defendant by registered post. Only once notice was sent at Delhi address which was returned with the endorsement of the Postman that the addressee is not residing at Delhi. The said endorsement does not amount service even by refusal.

Learned counsel for the respondent, on the other hand, supports the order under appeal.

Considered the respective submissions of the learned counsel for the parties and perused the record.

We have already noticed the entries recorded in the order-sheet of the matrimonial petition. It is difficult to understand as to how the order dated 24th December, 2005 permitting the service of notice through publication was passed. There is nothing on record to suggest that the appellant-wife in any

manner avoided the receiving of summons and notice of the case.

The Apex Court in ***Mrs. Payal Ashok Kumar Jindal v. Captain Ashok Kumar Jindal***, (1992) 3 SCC 116, has held that service of notice through publication is weakest mode of service. When the notice came back with endorsements that appellant could not be found at the given address, it cannot be said that the appellant refused to receive the notice. The relevant paragraphs no. 13 & 14 of the said judgment are reproduced below:

"13. In any case — realising the requirements of natural justice — the Family Court, sent two registered notices to the appellant at her Noida address and also at the address given by her in the proceedings before this Court. Unfortunately, both the notices came back with the endorsements that the appellant could not be found on the given addresses. There is no material on the record to reach a conclusion that the appellant refused to receive the notices. There is also nothing on the record to show as to whether the postal authorities made any efforts to deliver the registered letters to any of the appellant's relations at the given addresses. The courts below are wholly unjustified in holding that the appellant refused to receive the notices and further that the said notices could have been received by any of her relations on the given addresses.

14. After the notices sent by registered post were received back, the Family Court did not make any attempt to serve the appellant through the process of the Court. The appellant was no stranger to the respondent. She was his wife. It could not have been difficult for him to find out the address where she was staying. Under the circumstances, resort to the substitute service by way of publication in the newspaper was not justified."

In the case of ***Great Punjab Agro Industries Ltd. v. Khushian and others***, (2005) 13 SCC 503, it has been held that publication of notice in a newspaper having no circulation in the city is no service in the eyes of law.

In the case of *Smruti Pahariya v. Sanjay Pahariya* (2009) 13 SCC 338, it has been held that the Court cannot, in absence of its own satisfaction that the party is evading service, direct substituted service under Order 5 Rule 20 of the C.P.C.

Having regard to the above, we are of the opinion that the court below was not justified on the facts of the present case in holding that the wife was sufficiently served before passing of the ex parte decree. The ex parte decree was passed without giving any proper opportunity of hearing to the respondent-wife and as such the said decree dated 6th February, 2006 cannot be allowed to stand. The court below was not justified in rejecting the application for setting aside the ex parte decree by the order under appeal. The court has proceeded in the matter with undue haste and it readily granted the divorce decree. We cannot approve the manner in which the ex parte decree

has been passed.

In the result, the order dated 7th November, 2007 passed in Misc. Case No. 10 of 1996 and the ex parte decree dated 6th February, 2006 passed in Original Suit No. 693 of 2005 are hereby, set aside.

In view of the above, the appeal is allowed and the matter is restored back to the family court to re-hear and re-decide the petition expeditiously after giving an opportunity of hearing to the wife who is appellant herein.

The appellant-wife shall file written statement within 30 days. The parties are directed to appear before the court below on 03.09.2012. No further time to file the written statement shall be granted and the parties should be ready with their evidence.

The court below shall make an endeavour to dispose of the matter expeditiously preferably within a period of six months thereafter.

(A.K. Tripathi (II),J) (Prakash Krishna,J)

Order Date :- 1.8.2012
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