

Amarjit Singh v. Surinder Kaur (I. S. Tiwana, J.)

Schedule as has been done by the learned trial Magistrate, for that Schedule too has to operate with the aid of section 8 of the Hindu Succession Act, which provides for general rules of succession in the case of males. The view taken by the learned Magistrate in this regard is obviously faulty and deserves to be set aside.

(4) Even otherwise, the matter is purely of a civil nature. Retention of articles in such a situation cannot be attributed any colour of criminality. It is more a civil cause deservedly to be settled in a Civil Court. On that score as well, I do not think this to be a case in which a charge should have been framed against the petitioners on the projected facts, even if those projected facts were taken to be true.

(5) For the view I have taken, this petition merits acceptance and the order of charge is quashed. However, it is made clear that, since the first informant was not a party to these proceedings, nothing said herein with regard to his civil rights be taken to have been settled in his absence. The observations made herein are solely confined to the decision on the question of charge.

N.K.S.

Before I. S. Tiwana, J.

AMARJIT SINGH,—Appellants.

versus

SURINDER KAUR,—Respondent.

First Appeal from Order No. 210 of 1981.

December 8, 1982.

Code of Civil Procedure (V of 1908)—Order 5 Rules 12, 17 and 19-A—High Court Rules and Orders Volume IV, Chapter 7-B, Para (a) Rule 1(i)—Service of summons—Refusal of service alleged by the process server—Process server effecting service by affixation—Such service—Whether proper—No notice sent by registered post—Ex-parte proceedings taken in such circumstances—Whether justified—Procedure for affecting service of summons—Stated.

Held, that wherever practicable, service of summons must be affected on the defendant in person unless either he cannot be

found out or he has an agent empowered to accept service. The provisions of Chapter 7-B of the High Court Rules and Orders (Volume IV) lay down that every attempt should be made to effect personal service in the first instance and the process server should go again and again for this purpose. Service in one of the ways enumerated in Order 5, Rules 12 to 16 of the Code of Civil Procedure, 1908 has to be insisted upon and service by affixation under Rule 17 should not normally be allowed till after the day fixed for scrutiny. As per these rules, the Court should fix two dates—First for the return of the process with a report of the Process Serving Agency and the other for the hearing of the case. The interval between the dates of issue and return on the one hand and between the return and the hearing on the other, shall in each case have adequate time for service of the process and it should not be left to the discretion of the process server to decide whether he should effect personal or substituted service. The court should not proceed to hear a suit *ex parte* until it is proved to its satisfaction that the summons has been duly served strictly in the manner provided in the High Court Rules and Orders. Equally imperative for the Court is to comply with the provisions of Rule 19A of Order 5 of the Code. (Para 5).

Appeal from the order of Shri Gurjit Singh Sandhu, Additional District Judge, Ludhiana, dated 7th May, 1981, dismissing the application for setting aside ex parte decree of divorce granted in favour of the respondent and leaving the parties to bear their own costs.

Vijay Jhanji Advocate, with Virender Sood, Advocate, for the Appellants.

D. S. Nehra, Advocate with Arun Nehra, Advocate, for the Respondent.

JUDGMENT

I. S. Tiwana, J.

(1) *Vide* the impugned order, dated May 7, 1981, the appellant's prayer for setting aside the decree of divorce granted against him on March 12, 1979, at the instance of the respondent wife, has been declined by the trial Court (Additional District Judge, Ludhiana).

(2) In the petition filed by the respondent under section 13 of the Hindu Marriage Act, 1955 (for short, the Act) the appellant was proceeded against *ex parte* on March 1, 1979, as he failed to appear in Court in response to the summons claimed to have been served on him through affixation and the decree was granted in favour of

the respondent on March 12, 1979 on the basis of the *ex parte* evidence led against him. The case put-forward by the appellant in his application, dated April 11, 1979, under Order 9, Rule 13, Code of Civil Procedure, was that as a matter of fact he had never been served with any notice and it was Amar Singh (R.W. 2), father of the respondent who in connivance with Rajinder Singh, Process-server (R.W. 1) secured a wrong report of his service. According to him, he came to know of the *ex-parte* decree for the first time on April 9, 1979, when one of his aunts, Mrs. Pritam Kaur (A.W. 1) who had approached the respondent's parents to bring about a reconciliation between the parties to the litigation and had been informed by the respondent's father that she had already obtained an *ex parte* decree against the appellant from the Court of the Additional District Judge, informed him all about it. In support of this plea of his he not only examined Pritam Kaur and other witnesses including himself but also pleaded that on February 25, 1979, that is, the day on which the Process-server claims to have gone to his residence and alleges to have effected services on him, he was not in the house from 4.30 A.M. till sunset and was away to a temple known as 'Kali Ka Bhawan' in the suburb of Ludhiana town in connection with the Shivratri celebrations. He claims himself to be a devotee of Kali Mata. To negative this claim of the appellant, the respondent did not choose to step into the witness-box but, however, examined the Process-server Rajinder Singh (R.W. 1), her father, Amar Singh (R.W. 2) and Babu Ram, R.W. 3 to support the validity of the proceedings that had been taken against him.

(3) The learned counsel for the appellant now contends that not only the lower court has misread and misinterpreted the evidence on record, but also maintains that there has been no service of summons at all on the appellant in the eye of law. In support of his latter mentioned contention, the learned counsel points out that:—

- (i) the summons, Exhibit R. 1 was not issued to the appellant as a party to any litigation or the proceedings under section 13 of the Act but as per its contents the appellant's presence was required on March 1, 1979 as a witness;
- (ii) the Process-server had no authority to effect substituted service on the appellant in the absence of any specific order by the Court and as a matter of fact the course adopted by him is clearly violative of the Rules framed by the High Court sub-rule (1), Chapter 7-B, para (a) of the High Court Rules and Orders, Volume (IV), in this regard; and

- (iii) the trial Court failed to comply with the mandatory provisions of Order 5, Rule 19-A of the Code of Civil Procedure in not simultaneously issuing summons for service through registered post.

(4) After hearing the learned counsel for the parties at some length, in the light of the evidence on record. I find that the above-noted submissions of the learned counsel for the appellant are not devoid of merit. It is the admitted case of the respondent that on February 25, 1979, when the Process-server, R.W. 1, is alleged to have gone to the house of the appellant, he was solely accompanied by Amar Singh, father of the respondent. Though these two witnesses, that is, R.Ws. 1 and 2 also claim that another person, namely, Babu Ram, R.W. 3 had joined them on the way but I find no substance in that stand as no role has been attributed to him in the matter of effecting the service. As per the Process-server he first went to the house of Amar Singh to take him to point out the place of residence of the appellant. He further states that on his calling the appellant outside the house, the latter did appear there but before signing the copy of the summons by way of acknowledgement of the receipt of the summons, he went inside the house saying that he will bring his own pen to sign the same. Later he failed to turn up. After waiting for 15 or 20 minutes for the appellant, the Process-server claims to have resorted to affixation of the copy of the summons and the petition on the outer wall of the house. This report of the Process-server on the back of the summons, Exhibit R. 1, bears the solitary endorsement of Amar Singh, R.W. 2. Even Babu Ram who is claimed to have accompanying these two witnesses has not been made to sign this report anywhere what to talk of any person from the locality. This is the total evidence examined on behalf of the respondent. In the light of the same I feel that in all probability the learned counsel for the appellant is right in claiming that this service of summons is only a cooked up affair and a result of the connivance between R.Ws. 1 and 2.

(5) Besides this I find, the appellant deserves to succeed on legal grounds noticed above. As has been pointed out in an earlier judgment of this Court in *Arjan Singh and others v. Hazara Singh and others*, (1) the Code of Civil Procedure (Order 5, Rule 12) insists that wherever practicable, service of summons must be effected on the defendant in person unless either he

(1) 1965 P.L.R. 643.

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cannot be found out or he has an agent empowered to accept service. The above-noted provisions of the High Court Rules and Orders lay down that every attempt should be made to effect personal service in the first instance and the Process-server should go again and again for this purpose. Service in one of the ways enumerated in Order 5, Rules 12 to 16 of the Code of Civil Procedure has to be insisted upon and service by affixation under Rule 17 should not normally be allowed till after the day fixed for scrutiny. As per these rules, the Court should fix two dates—first for the return of the process with a report of the Process-serving Agency and the other for the hearing of the case. The interval between the dates of issue and return on the one hand and between the return and hearing on the other, shall in each case have adequate time for service of the process and it should not be left to the discretion of the Process-server to decide whether he should effect personal or substituted service. The Court should not proceed to hear a suit *ex parte* until it is proved to its satisfaction that the summons has been duly served strictly in the manner provided in the High Court Rules and Orders. Equally imperative for the Court is to comply with the provisions of Rule 19A of Order 5, Code of Civil Procedure. It appears that it is with a view to safeguard against such a contingency as has arisen in this case that this provision of law was recently introduced in the year 1976. It has been ruled by this Court in *Nasib Singh v. Jagdish Chand* (2), that when both the modes of service of summons prescribed are not resorted to, the *ex parte* order or decree deserves to be set aside on that score alone. Compliance of Rule 19-A is to be more particularly insisted upon in matrimonial cases. In *Shanti Devi v. Mangat Rai* (3), my learned brother, M. R. Sharma, J., has observed that in matrimonial cases if one of the parties to the proceedings approaches the Court with a prayer that *ex parte* decree passed against it should be set aside, the Court should more readily accept such a prayer and perform its statutory duty of giving a decision on merits only if it fails to effect a compromise between the parties.

Faced with these legal infirmities in the matter of service of summons on the appellant in spite of which the respondent succeeded in securing an *ex-parte* decree of divorce, her learned counsel, Mr. D. S. Nahra, contends that as a matter of fact the appellant was not interested in opposing the prayer made in the

(2) 1980 P.L.R. 729.

(3) 1977 P.L.R. 476.

petition under section 13 of the Act for the reason that parties to the litigation had already arrived at a settlement on August 27, 1978, whereby they had severed their marital relationship completely after returning to each other the various articles which had been given or presented to them at the time of their marriage, about three years earlier. I, however, do not feel the necessity of going into this aspect of the matter any further for the short reason that no material to that effect has been brought on the records of these proceedings. In any case, if the respondent can depend on such a settlement or compromise, she has to prove the same during the course of regular proceedings for divorce. This, however, may be stated that the appellant stoutly denies the genuineness and the validity of any such settlement or compromise claimed to have been effected between the parties.

For the reasons recorded above, I allow this appeal and while setting aside the impugned order, dated May 7, 1981, also set aside the *ex parte* decree granted against the appellant under section 13 of the Act on March 12, 1979 and direct the trial Court to proceed to decide the same on merits in accordance with law. The parties through their counsel are directed to appear before the lower Court on January 5, 1983.

N.K.S.

Before S. S. Sandhwalia, C.J. & S. S. Sodhi, J.

AMIN CHAND,—Petitioner.

versus

THE STATE OF HARYANA and others,—Respondents.

Civil Writ Petition No. 1779 of 1982.

December 8, 1982.

Government instructions on voluntary retirement—Clause V—Government employee serving a notice for voluntary retirement and then seeking to withdraw the same—Government instructions permitting withdrawal of the notice only with the approval of the appropriate authority—Such employee—Whether still entitled to withdraw the notice before its expiry.

Held. that the right of a Government employee to seek voluntary retirement or to thereafter withdraw such a request are