REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO…1467… OF 2011
(Arising out of S.L.P.(C) NO. 19632 of 2007)

Parimal ... Appellant

Versus

Veena @ Bharti ...Respondent

J U D G M E N T

Dr. B.S. CHAUHAN, J.

1. Leave granted.

2. This appeal has been preferred against the judgment and order dated 17.7.2007, passed by the High Court of Delhi at New Delhi, in FAO No.63 of 2002, by which the High Court has allowed the application under Order IX Rule 13 of the Code of Civil Procedure, 1908 (hereinafter called CPC), reversing the judgment and order dated 11.12.2001, passed by the Additional District Judge, Delhi.

3. **FACTS**:

(A) Appellant got married to the respondent/wife on 9.12.1986 and out of the said wed lock, a girl was born. The relationship between

the parties did not remain cordial. There was acrimony in the marriage on account of various reasons. Thus, the appellant/husband filed a case for divorce on 27.4.1989, under section 13(1)(i-a) and (i-b) of the Hindu Marriage Act, 1955, against the respondent/wife.

(B) Respondent/wife refused to receive the notice of the petition sent to her by the Court on 4.5.1989 vide registered AD cover for the date of hearing on 6.7.1989. Respondent/wife on 28.6.1989 was present at her house when the process server showed the summons to her. She read the same and refused to accept it. Refusal was reported by the process server, which was proved as Ex.OPW1/B.

(C) Again on 7.8.1989, she refused to accept the notice for 8.9.1989, sent by the Court through process server. The Court ordered issuance of fresh notices. One was issued vide ordinary process and the other vide Registered AD cover for 8.9.1989. Registered AD was returned to the Court with report of refusal, as she declined to receive the AD notice. Under the Court's orders, summons were affixed at the house of the respondent/wife, but she chose not to appear.

(D) She was served through public notice on 6.11.1989 published in the newspaper 'National Herald' which was sent to her address, 3/47,

First Floor, Geeta Colony, Delhi. This was placed on record and was not rebutted by the respondent/wife in any manner.

(E) After service vide publication dated 8.11.1989 as well as by affixation, respondent/wife was proceeded ex- parte in the divorce proceedings. Ex-parte judgment was passed by Addl. District Judge, Delhi on 28.11.1989 in favour of the appellant/husband and the marriage between the parties was dissolved.

(F) Two years after the passing of the decree of divorce, on 16.10.1991, the appellant got married and has two sons aged 17 and 18 years respectively from the said marriage.

(G) The respondent, after the expiry of 4 years of the passing of the ex-parte decree of divorce dated 28.11.1989, moved an application dated 17.12.1993 for setting aside the same basically on the grounds that ex-parte decree had been obtained by fraud and collusion with the postman etc., to get the report of refusal and on the ground that she had not been served notice even by substituted service and also on the ground that even subsequent to obtaining decree of divorce the appellant did not disclose the fact of grant of divorce to her during the proceedings of maintenance under Section 125 of the Code of Criminal Procedure, 1973 (hereinafter called Cr.P.C.). The said

application under Order IX, Rule 13 CPC was also accompanied by an application under Section 5 of the Indian Limitation Act, 1963, for condonation of delay.

(H) The trial Court examined the issues involved in the application at length and came to the conclusion that respondent/wife miserably failed to establish the grounds taken by her in the application to set aside the ex-parte decree and dismissed the same vide order dated 11.12.2001.

(I) Being aggrieved, respondent/wife preferred First Appeal No.63 of 2002 before the Delhi High Court which has been allowed vide judgment and order impugned herein. Hence, this appeal.

RIVAL SUBMISSIONS:

4. Shri M.C. Dhingra, Ld. counsel appearing for the appellant has submitted that the service stood completed in terms of statutory provisions of the CPC by the refusal of the respondent to take the summons. Subsequently, the registered post was also not received by her as she refused it. It was only in such circumstances that the trial Court entertained the application of the appellant under Order V, Rule 20 CPC for substituted service. The summons were served by publication in the daily newspaper 'National Herald' published from

Delhi which has a very wide circulation and further service of the said newspaper on the respondent/wife by registered post. The High Court committed a grave error by taking into consideration the conduct of the appellant subsequent to the date of decree of divorce which was totally irrelevant and unwarranted for deciding the application under Order IX, Rule 13 CPC. More so, the High Court failed to take note of the hard reality that after two years of the ex-parte decree the appellant got married and now has two major sons from the second wife. Therefore, the appeal deserves to be allowed and the judgment impugned is liable to be set aside.

5. On the contrary, Ms. Geeta Dhingra, Ld. counsel appearing for the respondent/wife has vehemently opposed the appeal, contending that once the respondent/wife made the allegations of fraud and collusion of the appellant with postman etc. as he succeeded in procuring the false report, the burden of proof would be upon the appellant and not upon the respondent/wife to establish that the allegations of fraud or collusion were false. The conduct of the appellant even subsequent to the date of decree of divorce, i.e. not disclosing this fact to the respondent/wife during the proceedings under Section 125 Cr.P.C., disentitles him from any relief before this

court of equity. No interference is required in the matter and the appeal is liable to be dismissed.

6. We have considered the rival submissions made by learned counsel for the parties and perused the record.

7. **Order IX, R.13 CPC:**

The aforesaid provisions *read as under:*

"Setting aside decree ex-parte against defendant

In any case in which a decree is passed ex-parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he ***satisfies*** *the Court that the* ***summons was not duly served****, or* ***that he was prevented by any sufficient cause from appearing*** *when the suit was called on for hearing,* ***the Court shall make an order setting aside the decree*** *as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;*

xx xx xx

Provided further that ***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's claim.*

xx xx xx"

(Emphasis added)

8. It is evident from the above that an ex-parte decree against a

defendant has to be set aside if the party satisfies the Court that **summons had not been duly served** or he **was prevented** by **sufficient cause** from appearing when the suit was called on for hearing. However, the court shall not set aside the said decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date and sufficient time to appear in the court.

The legislature in its wisdom, made the second proviso, mandatory in nature. Thus, it is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso herein.

9. "Sufficient Cause" is an expression which has been used in large number of Statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there

was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. (Vide: **Ramlal & Ors. v. Rewa Coalfields Ltd.,** AIR 1962 SC 361; **Sarpanch, Lonand Grampanchayat v. Ramgiri Gosavi & Anr.,** AIR 1968 SC 222; **Surinder Singh Sibia v. Vijay Kumar Sood,** AIR 1992 SC 1540; and **Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation & Another,** (2010) 5 SCC 459)

10. In **Arjun Singh v. Mohindra Kumar & Ors.**, AIR 1964 SC 993, this Court observed that every good cause is a sufficient cause and must offer an explanation for non-appearance. The only difference between a "good cause" and "sufficient cause" is that the requirement of a good cause is complied with on a lesser degree of proof than that of a "sufficient cause". (See also: **Brij Indar Singh v. Lala Kanshi Ram & Ors.,** AIR 1917 P.C. 156; **Manindra Land and Building Corporation Ltd. v. Bhutnath Banerjee & Ors**., AIR

1964 SC 1336; and **Mata Din v. A. Narayanan**, AIR 1970 SC 1953).

11. While deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing **substantial justice to all the parties concerned** and that the technicalities of the law should not prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it. (Vide: **State of Bihar & Ors. v. Kameshwar Prasad Singh & Anr.,** AIR 2000 SC 2306; **Madanlal v. Shyamlal**, AIR 2002 SC 100; **Davinder Pal Sehgal & Anr. v. M/s. Partap Steel Rolling Mills (P) Ltd. & Ors.,** AIR 2002 SC 451; **Ram Nath Sao** alias Ram Nath Sao **& Ors. v. Gobardhan Sao & Ors.,** AIR 2002 SC 1201; **Kaushalya Devi v. Prem Chand & Anr**. (2005) 10 SCC 127; **Srei International Finance Ltd., v. Fair growth Financial Services Ltd. & Anr.,** (2005) 13 SCC 95; and **Reena Sadh v. Anjana Enterprises**, AIR 2008 SC 2054).

12. In order to determine the application under Order IX, Rule 13 CPC, the test has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for

which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a strait-jacket formula of universal application.

PRESUMPTION OF SERVICE BY REGISTERED POST & BURDEN OF PROOF:

13. This Court after considering large number of its earlier judgments in **Greater Mohali Area Development Authority & Ors. v. Manju Jain & Ors.**, AIR 2010 SC 3817, held that in view of the provisions of Section 114 Illustration (f) of the Evidence Act, 1872 and Section 27 of the General Clauses Act, 1897 there is a presumption that the addressee has received the letter sent by registered post. However, the presumption is rebuttable on a consideration of evidence of impeccable character. A similar view has been reiterated by this Court in **Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra**, JT 2010 (12) SC 287.

14. In **Gujarat Electricity Board & Anr. v. Atmaram Sungomal Poshani**, AIR 1989 SC 1433, this Court held as under:

"There is presumption of service of a letter sent

under registered cover, if the same is returned back with a postal endorsement that the addressee refused to accept the same. No doubt the presumption is rebuttable and it is open to the party concerned to place evidence before the Court to rebut the presumption by showing that the address mentioned on the cover was incorrect or that the postal authorities never tendered the registered letter to him or that there was no occasion for him to refuse the same. ***The burden to rebut the presumption lies on the party, challenging the factum of service."***

(Emphasis added)

15. The provisions of Section 101 of the Evidence Act provide that the burden of proof of the facts rests on the party who substantially asserts it and not on the party who denies it. In fact, burden of proof means that a party has to prove an allegation before he is entitled to a judgment in his favour. Section 103 provides that burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any special law that the proof of that fact shall lie on any particular person. The provision of Section 103 amplifies the general rule of Section 101 that the burden of proof lies on the person who asserts the affirmative of the facts in issue.

PRESENT CONTROVERSY:

16. The case at hand is required to be considered in the light of the aforesaid settled legal propositions. The trial Court after appreciating the entire evidence on record and pleadings taken by the parties recorded the following findings:

> *"The applicant/wife as per record was served with the notice of the petition, firstly, on 4.5.89 when she had refused to accept the notice of the petition vide registered AD cover for the date of hearing i.e. 6.7.89 and thereafter on 7.8.89 when again she refused to accept the notice for 8.9.89 and thereafter when the notice was published in the newspaper `National Herald' on 6.11.89. The UPC Receipt dated 6.11.89 vide which the newspaper `National Herald' dated 6.11.89 was sent to the respondent/applicant at her address 3/47, First Floor, Geeta Colony, Delhi is on record and has not been rebutted in any manner.*
>
> *In these circumstances, the application u/o 9 Rule 13 CPC filed by the respondent/applicant/wife on 7.1.1994 is hopelessly barred by time and no sufficient ground has been shown by the applicant/wife for condoning the said inordinate delay."*

17. So far as the High Court is concerned, it did not deal with this issue of service of summons or as to whether there was "sufficient cause" for the wife not to appear before the court at all, nor did it set aside the aforesaid findings recorded by the trial Court. The trial Court has dealt with only the aforesaid two issues and nothing else.

The High Court has not dealt with these issues in correct perspective. The High Court has recorded the following findings:

> *"The order sheets of the original file also deserve a look. The case was filed on 1.5.1989. It was ordered that respondent be served vide process fee and Regd. AD for 6.7.1989. The report of process server reveals that process server did not identify the appellant and she was identified by the respondent himself. In next date's report appellant was identified by a witness. The Retd. AD mentions only one word "refused". It does not state that it was tendered to whom and who had refused to accept the notice. The case was adjourned to 8.9.1989. It was recorded that respondent had refused to take the notice. Only one word, "Refused" appears on this registered envelope as well. On 8.9.1989 itself it was reported that respondent had refused notice and permission was sought to move an application under Order 5 Rule 20 of CPC. On 8.9.1989, application under Section 5 Rule 20 CPC was moved and it was ordered that the appellant be served through "National Herald".* ***The presumption of law if any stands rebutted by the statement made by the appellant because she has stated that she was staying in the said house of her brother for a period of eight months.*** *The version given by her stands supported by the statement made by her brother."*
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> (Emphasis added)

18. The High Court held that presumption stood rebutted by a bald statement made by the respondent/wife that she was living at different address with her brother and this was duly supported by her brother

who appeared as a witness in the court. The High Court erred in not appreciating the facts in the correct perspective as substituted service is meant to be resorted to serve the notice at the address known to the parties where the party had been residing last. (Vide **Rabindra Singh v. Financial Commissioner, Cooperation, Punjab & Ors.**, (2008) 7 SCC 663).

19. More so, it is nobody's case that respondent/wife made any attempt to establish that there had been a fraud or collusion between the appellant and the postman. Not a single document had been summoned from the post office. No attempt has been made by the respondent/wife to examine the postman. It is nobody's case that the "National Herald" daily newspaper published from Delhi did not have a wide circulation in Delhi or in the area where the respondent/wife was residing with her brother. In such a fact-situation, the impugned order of the High Court becomes liable to be set aside.

20. The appellate Court has to decide the appeal preferred under Section 104 CPC following the procedure prescribed under Order XLIII, Rule 2 CPC, which provides that for that purpose, procedure prescribed under Order XLI shall apply, so far as may be, to appeals

from orders. In view of the fact that no amendment by Delhi High Court in exercise of its power under Section 122 CPC has been brought to our notice, the procedure prescribed under Order XLI, Rule 31 CPC had to be applied in this case. .

21. Order XLI, Rule 31 CPC provides for a procedure for deciding the appeal. The law requires substantial compliance of the said provisions. The first appellate Court being the final court of facts has to formulate the points for its consideration and independently weigh the evidence on the issues which arise for adjudication and record reasons for its decision on the said points. The first appeal is a valuable right and the parties have a right to be heard both on question of law and on facts. (vide: **Moran Mar Basselios Catholicos & Anr. v. Most Rev. Mar Poulose Athanasius & Ors.**, AIR 1954 SC 526; **Thakur Sukhpal Singh v. Thakur Kalyan Singh & Anr.**, AIR 1963 SC 146; **Santosh Hazari v. Purshottam Tiwari,** AIR 2001 SC 965; **Madhukar v. Sangram**, AIR 2001 SC 2171; **G. Amalorpavam & Ors. v. R.C. Diocese of Madurai & Ors.**, (2006) 3 SCC 224; **Shiv Kumar Sharma v. Santosh Kumari**, (2007) 8 SCC 600; and **Gannmani Anasuya & Ors. v.**

Parvatini Amarendra Chowdhary & Ors., AIR 2007 SC 2380).

22. The first appellate Court should not disturb and interfere with the valuable rights of the parties which stood crystallised by the trial Court's judgment without opening the whole case for re-hearing both on question of facts and law. More so, the appellate Court should not modify the decree of the trial Court by a cryptic order without taking note of all relevant aspects, otherwise the order of the appellate Court would fall short of considerations expected from the first appellate Court in view of the provisions of Order XLI, Rule 31 CPC and such judgment and order would be liable to be set aside. (Vide **B.V. Nagesh & Anr. v. H.V. Sreenivassa Murthy**, JT (2010) 10 SC 551).

23. In view of the aforesaid statutory requirements, the High Court was duty bound to set aside at least the material findings on the issues, in spite of the fact that approach of the court while dealing with such an application under Order IX, Rule 13 CPC would be liberal and elastic rather than narrow and pedantic. However, in case the matter does not fall within the four corners of Order IX, Rule 13 CPC, the court has no jurisdiction to set aside ex-parte

decree. The manner in which the language of the second proviso to Order IX, Rule 13 CPC has been couched by the legislature makes it obligatory on the appellate Court not to interfere with an ex-parte decree unless it meets the statutory requirement.

24. The High Court has not set aside the material findings recorded by the trial Court in respect of service of summons by process server/registered post and substituted service. The High Court failed to discharge the obligation placed on the first appellate Court as none of the relevant aspects have been dealt with in proper perspective. It was not permissible for the High Court to take into consideration the conduct of the appellant subsequent to passing of the ex-parte decree.

More so, the High Court did not consider the grounds on which the trial Court had dismissed the application under Order IX, Rule 13 CPC filed by the respondent/wife. The appeal has been decided in a casual manner.

25. In view of the above, appeal succeeds and is allowed. The judgment and order dated 17.7.2007 passed by the High Court of Delhi in FAO No. 63 of 2002 is set aside and the judgment and order of the trial Court dated 11.12.2001 is restored.

Before parting with the case, it may be pertinent to mention here that the court tried to find out the means of re-conciliation of the dispute and in view of the fact that the appellant got married in 1991 and has two major sons, it would not be possible for him to keep the respondent as a wife. A lump sum amount of Rs. 5 lakhs had been offered by Shri M.C. Dhingra, Ld. counsel for the appellant to settle the issue. However, the demand by the respondent/wife had been of Rs. 50 lakhs. Considering the income of the appellant as he had furnished the pay scales etc., the court feels that awarding a sum of Rs. 10 lakhs to the wife would meet the ends of justice as a lump sum amount of maintenance for the future. The said amount be paid by the appellant to the respondent in two equal instalments within a period of six months from today. The first instalment be paid within three months.

……..J.
(P. SATHASIVAM)

……..J.
(Dr. B.S. CHAUHAN)

New Delhi,
February 8, 2011