

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Reserved on 03.02.2023
Pronounced on 09.02.2023

MA No. 7/2020

Dr. Kiran BalaAppellant(s)/Petitioner(s)

Through: Mr. Ayush Pangotra, Advocate

Vs

Dr. Ashwani Kumar Singh Jasrotia Respondent(s)

Through: Mr. Jagpaul Singh, Advocate

Coram: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1. The appellant has challenged order dated 10.02.2020 passed by the learned Principal District Judge, Kathua, whereby his application under Order IX Rule 13 of the Code of Civil Procedure(CPC) for setting aside *ex parte* judgment and decree dated 31.03.2018 passed by the same court, has been dismissed.
2. It appears that the respondent had filed a petition for dissolution of marriage under section 13 of the Jammu and Kashmir Hindu Marriage Act before the learned trial court. After summons were issued to respondent appellant herein, the same are stated to have been served upon her father on a couple of occasions who assured the Process Server that he will make the appellant/defendant to appear before the court on the date fixed. When the appellant did not appear before the court below on the date fixed, she was proceeded *ex parte* in terms of order dated 28.10.2017 passed by the learned trial court and the respondent herein was directed to lead evidence in *ex parte*.

3. The learned trial court after recording the *ex parte* evidence, passed *ex parte* judgment and decree dated 31.03.2018 whereby the petition of the respondent was accepted and *ex parte* decree of divorce under section 13(1)(ii)(v) of the Jammu and Kashmir Hindu Marriage Act was passed in favour of the respondent herein and against the appellant herein.
4. It appears that the appellant herein filed an application under Order IX Rule 13 of the CPC seeking setting aside of *ex parte* judgment and decree dated 31.03.2018 and along with said application, another application under section 5 of the Limitation Act seeking condonation of delay was also filed by the appellant before the trial court on 13.10.2018.
5. The grounds urged by the appellant before the trial court was that she was never served with the summons and even if it was served upon her father, he did not inform her about the same because the appellant was suffering from mental trauma and depression during the relevant period. According to the appellant, had her father shared information with regard to the filing of the divorce petition with her, she would have lost her life and for this reason, her father did not disclose this information to her. The appellant is stated to have come to know about the *ex parte* judgment and decree only when the respondent sent a copy to her on her Whatsapp number, but she could not understand the legal repercussions of the said judgment and decree. She had to consult her advocate, which she did on 11.10.2018 whereafter she moved the application for setting aside the *ex parte* judgment and decree.

6. The respondent herein contested the application filed by the appellant and submitted his objections thereto. In his objections, the respondent contended that the appellant had the knowledge about the pendency of the petition and she had been duly served through her father but she did not choose to appear before the court. It appears that the parties were given option by the learned trial court to lead evidence in support of their respective cases but they did not choose to do so.
7. Learned trial court after hearing the parties dismissed the application of the appellant after holding that she has been properly served with the summons of the suit and as such, there was no ground to set aside the *ex parte* judgment and decree.
8. The appellant has challenged the impugned order primarily on the ground that the service of the summons has not been effected upon her in terms of Order V Rule 15 of the CPC as the conditions contained therein have not been satisfied. It has been submitted that the respondent knew that the appellant was not residing with her father but was residing at Lakhanpur and in spite of this he gave wrong address of the appellant in the divorce petition so as to obtain an *ex parte* decree against her.
9. I have heard learned counsel for the parties and perused the record of the case.
10. Before dealing with the grounds raised by the appellant for setting aside the impugned order passed by the learned trial court, it would be apt to refer to the provisions contained in Order IX Rule 13 CPC, which reads as under:

“13. Setting aside decree *ex parte* against defendants- 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;

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

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.

Explanation-Where there has been an appeal against a decree passed *ex parte* under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the *ex parte* decree.”

11. From a perusal of the aforesaid provision, it is clear that for a defendant to succeed in an application for setting aside *ex parte* decree, he has to satisfy 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.
12. In the instant case, the appellant has challenged the *ex parte* proceedings and decree on the ground that she was not duly served inasmuch as she was not living with her father at the relevant time when the summons were received by her father. In this case, service of the summons upon the appellant has been effected by taking resort to provisions contained in Order V Rule 15 of the CPC, which reads as under:

“15. Where service may be on an adult member of defendant’s family.- Where in any suit the defendant is absent from his residence at the time when the service of summons is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf, service may be made on any adult member of the family, whether male or female, who is residing with him.

Explanation: A Servant is not a member of the family within the meaning of this rule.”

13. From a perusal of the aforesaid provision, it is clear that before resorting to provisions contained in Order V Rule 15 of the CPC, it has to be shown that the defendant is absent from his residence at the time when the service of the summons is sought to be effected and there is no likelihood of his being found at the residence within a reasonable time. It has also to be shown that the defendant has no agent empowered to accept the service of the summons on his behalf. It is only after satisfaction of aforementioned conditions that service of the summons can be made on any adult member of the family who is residing with him.
14. In the instant case, a perusal of the record would show that on 10.08.2017, summons were issued by the trial court to the appellant, at the address of her father’s house located at Ward No. 15, Patel Nagar, Kathua. The report of the Process Server reveals that the appellant was not present at the said address but her father conveyed to Process Server that she had gone out of station whereafter he received the summons by endorsing his signatures thereon. The father of the appellant also conveyed to the Process Server that the appellant would appear before the court on the date fixed. On 30.08.2017, another summon was issued

by the trial court to the appellant on the same address and a similar report has been endorsed by the Process Server on the said summon. On 28.10.2017 statement of the Process Server was recorded on oath by the learned trial court in which he confirmed the veracity of the reports on the two summons. Thereafter, on 28.10.2017, the trial court relying upon the report of the Process Server declared that the appellant has been served through her father and proceeded *ex parte* against her.

15. The main contention of the learned counsel for the appellant is that the respondent has mischievously given wrong address of the appellant in the petition though he knew that the appellant was residing at Lakhanpur in a rented accommodation. In this regard, learned counsel for the appellant has referred to the averments made in the petition filed by the respondent under section 13 of the Jammu and Kashmir Hindu Marriage Act in which it has been pleaded that in the month of October, 2016 the appellant shifted to Jammu along with her minor son and in May, 2017, she shifted to Lakhanpur and resided there in a rented accommodation along with her minor child.

16. There is no doubt that the aforesaid averments have been made by the respondent in his petition but there is no unequivocal admission on the part of the respondent that at the time when the summons were issued, the appellant herein had permanently shifted from the house of her father. In fact, the appellant while filing the application for setting aside *ex parte* decree did not urge this ground and did not even whisper that she was not residing in the house of her father at the relevant time. Even in the present petition, the petitioner has given her address, which is that

of her father, meaning thereby even at present, she residing in the house of her father. Therefore, it cannot be stated that the appellant was not residing with her father at the time when the summons were served upon her father. The argument raised by the appellant in this regard is an afterthought, which cannot be urged for the first time in appeal.

17. It has been contended that the appellant was suffering from mental trauma and depression as such, her father could not convey to her the information regarding pendency of the suit. The appellant has not led any evidence before the learned trial court to show that she was facing mental depression at the relevant time to such an extent that disclosing information about the pendency of the divorce petition, would have endangered her life. The appellant despite having been given opportunity by the learned trial court, did not lead any evidence to support her contentions which was vehemently denied by the respondent herein in his reply.
18. From a meticulous analysis of the trial court record, it is clear that the learned trial court had made several attempts to serve summons upon the appellant in person but in spite of Process Server having visited her given address on a couple of occasions, she could not be found there and her father accepted the summons informing the Process Server that he would convey the same to the appellant. The father of the appellant did not disclose to the Process Server that the appellant was not residing with him nor did he come in the witness box before the trial court to state so. In these circumstances, in the absence of anything on record to the contrary, the trial court on the basis of the material on record was

justified to infer that the appellant was residing with her father and there was no likelihood of her being found at her residence within a reasonable time. It is not the case of the appellant that she had empowered any agent to accept service of summons on her behalf. Thus, conditions mentioned in Order V Rule 15 of the CPC were satisfied in the instant case and accordingly, learned trial court rightly declared that the appellant has been duly served with the summons. Once she did not appear before the learned trial court, there was no option left before the trial court but to proceed *ex parte* against her and to pass *ex parte* judgment and decree on the basis of *ex parte* evidence led by the respondent herein.

19. For the forgoing reasons, I do not find any ground to interfere with the impugned order passed by the learned trial court. The appeal lacks merit and is dismissed as such.

(SANJAY DHAR)
JUDGE

Jammu
09.02.2023
Rakesh

Whether the order is speaking:	Yes
Whether the order is reportable:	Yes