

(2012) 04 BOM CK 0090

In the Bombay High Court

Case No : CAM/76 of 2012 in Family Court Appeal (Stamp) No. 7883 of 2012

Mrs. Regi Suresh Nair

APPELLANT

Vs

Shri Suresh Putharakkal Nair

RESPONDENT

Date of Decision : 20-04-2012

Acts Referred:

Citation : (2012) 4 ALLMR 624 : (2012) 5 BomCR 63 : (2012) 2 DMC 293 :
(2012) 3 MhLj 783

Hon'ble Judges : P. B. Majmudar, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : A.S. Khandeparkar instructed by Mrs. Shilpa Joshi, for the Appellant;
H. K. Menghani, for the Respondent

Judgement

P. B. Majmudar, J.—Rule. By consent the Application is taken up for hearing today. This is an Application filed by the Appellant/wife for condoning the delay of about 5 years, 144 days in filing the Appeal which is against the decree of divorce granted by the trial Court. The Respondent herein has filed a marriage Petition being Petition No. A1406 of 2005 for dissolving the marriage on the ground of cruelty and alternatively on the ground of judicial separation. The Family Court by its order dated 11 July 2006 passed an exparte decree by dissolving the marriage on the ground that though served the original Respondent/wife has not appeared in the proceedings. The trial Court accordingly allowed the application of the original Respondent/husband on 11 July 2006. It is the aforesaid order which is challenged in this Appeal. Since there is an inordinate delay for more than 5 years, this Civil Application is filed for condonation of delay.

2. Mr. Khandeparkar, the learned counsel appearing for the applicant/wife vehemently argued that this is a case in which the Respondent/husband surreptitiously and by committing fraud proceeded with the Family Court application against the wife though the Court summons was never served on the applicant/wife. It is the say of the applicant that the Respondent/husband has

played smart and wanted to deceive the wife as according to him, even though the divorce was granted by the trial Court on 11 July 2006, the Respondent/husband never informed about the same and continued to reside as husband and wife all through out keeping the lady in dark. It is submitted by him that subsequently, in order to take away the house wherein the Appellant used to reside with the Respondent/husband, he took out the proceedings for obtaining possession in the Civil Court. At the time when she received the summons regarding the aforesaid matter, she realised that the Respondent wants to take away the possession of the house where she is residing along with him and in fact she came to know for the first time that there is decree for divorce passed by the trial Court. Having realised the said aspect, she filed an application for setting aside exparte decree in which the trial Court condoned the delay. However, the trial Court rejected the application for setting aside the decree on the ground that wife has not made any allegation against the bailiff regarding the service of notice and, therefore, the Family Court did not accept the application for setting aside the exparte decree. Under these circumstances, the Appellant/applicant has chosen to file substantive Appeal against the original order and in the process there is a delay of 5 years and by this Application the said delay may be condoned.

3. In order to substantiate his say, the learned counsel has placed additional bunch of documents, copy of which is given to the other side. It is pointed out that on 21 December 2006, that is after six months from the aforesaid so-called decree of divorce, the husband has taken out Tata AIG life Policy, wherein in the column of "spouse", the name of the present applicant is shown as wife. It is submitted by the learned counsel that that itself shows that the Respondent wanted to keep the Appellant in dark about the divorce decree otherwise after six months from the date of the divorce, he would not have mentioned the name of his wife as nominee. It is submitted by him that in the column of "nominee", the name of the wife is shown, which form was filled in after six months since the decree of divorce is passed by the trial Court.

4. The learned counsel has also relied upon the certificate issued by; the Secretary where the premises is located, that is Matruprem Cooperative Housing Society which is dated 22 February 2008. The certificate is issued by the Chairman/Secretary/Treasurer of the society, wherein it is stated that the applicant is residing with the Respondent in room No. G/2 from May 2003 till date i.e. 22/02/2008. As per the certificate, the name of the applicant is shown as wife. It is therefore obvious that after obtaining the decree the Respondent kept the lady in dark about such decree which strengthens the argument of the applicant that summons of the original proceedings was never served on the wife and accordingly the behaviour of the Respondent in this behalf itself speaks about the same.

5. The learned counsel has relied on bailiff's report which is important document to show that whether the court proceedings were served on the wife or not. The

bailiff's report is at page 44. In the report, the bailiff says that, as per the said report, when the bailiff went to serve the summons on 24 November 2005 it was a working day i.e. Thursday. As per the bailiff's report, he went to serve the summons at the premises in question and that he found the applicant/lady in house, but she refused to accept the summons and therefore he wanted to paste the same outside the house, but she did not allow him to do so. Accordingly, he prepared a report as "unserved". The word "unserved" is very much finding place in the report at page 44. It is submitted by Mr. Khandeparkar, the learned counsel that if the summons is unserved, it cannot be said as valid service and, therefore, the Family Court Judge has committed a grave error in proceeding with the matter, treating that wife is served and she is not appearing in the matter. It is submitted that since the concerned Respondent has committed mischief and fraud by which the decree is obtained, delay in filing Family Court Appeal is required to be condoned. It is submitted that after the application under Order 9, Rule 13 of CPC (CPC) for exparte decree is rejected, immediately this Appeal is filed within a period of two months.

6. The learned counsel appearing for the Respondent, on the other hand, submits that since the bailiff in his report has said that the applicant has refused to accept the summons, according to him, refusal of court summons is valid service and, therefore, the Family Court rightly proceeded with the matter, treating that wife has not put her appearance. The learned counsel further submits that it is true that the Respondent, at the relevant time, was serving in a particular company and the date on which the summons was served was a Thursday. The learned counsel states that the applicant is a serving women as she was serving as Office Assistant in Rashtriya Minerals, Bhayandar and, therefore, in fact she was in service on the relevant day.

7. The learned counsel for the Respondent has frankly stated that it is true that the wife was serving at the relevant time, but according to him, once the bailiff has given the report that she refused to accept the notice, it should be treated as a valid service. He submits that the bailiff has also not mentioned any time in the report. He is not aware whether, on the relevant day, his wife has taken leave from the employment or not. It is further submitted by him that refusal is a valid service. He further submits that it is true that even after decree, he continued to stay with the wife for more than 16 months. The learned counsel submits that even after the decree, within 20 days, he sent a registered letter to his wife, but according to him, he could not serve, as the endorsement is "unclaimed". He further stated that even after divorce for more than 16 months he was residing in the house and thereafter he filed a Suit for getting possession of the flat in question.

8. We have heard both the learned counsel appearing for the parties at length. We have also gone through the application filed by the applicant and reply filed by the Respondent and we have also gone through the bunch of documents which we have discussed above. The present case reflects the sorry state of

affairs as to how lightly the decree is passed by the Family Court without verifying whether the summons has been served upon the concerned person or not. When a Family Court decides a family dispute, the Judge in charge of the matter, is required to be doubly sure that the court summons is properly served on the party concerned in a case where no appearance is made by the husband or wife, as the case may be, before the Court. As per the bailiff's report, it is clear that the bailiff has not tried to see that somebody identified the lady who was in the house. It is not in dispute that bailiff was not knowing the lady personally nor the bailiff had made any attempt to keep any witness present to identify the person who was in the house nor the summons was served in the presence of the husband. The bailiff therefore put an endorsement of "unserved" and there is no endorsement of service by refusal, which aspect is very well clear, as per the report of the bailiff. In spite of the same, the concerned Judge, in our view, is, in a most casual manner treated the said bailiff's report as if the Respondent is served.

9. It is unfortunate that even while deciding an application under Order 9 Rule 13 of CPC, the concerned Judge has not seen the summons and endorsement on the summons by the bailiff shows as "unserved".

10. Be that as it may, once there is an endorsement of refusal by a party, the person who is serving the notice is required to point out that he has identified the person and the same person either by the party to the litigation or by panchas or neighbours in the area. As pointed out above, the bailiff was not knowing the lady concerned, nor she was identified by anybody, the learned counsel for the Respondent frankly accepted the fact that that bailiff was not knowing the lady and there is nothing in the report that somebody has identified the lady. Looking to the bailiff's report, it is clear that the bailiff's report clearly shows that notice is unserved. If there is unserved notice, the concerned Judge was required to take care by issuing fresh summons and verifying himself that there should be a valid service of notice. In case of doubt, the concerned Judge should issue fresh summons as the Judge is not required to decide the matter in great haste without verifying whether the court summons is served or not, as ultimately the Court is required to do justice between the parties in accordance with law.

11. By reading the report of the bailiff as we have indicated above, the Judge should have issued fresh summons as the endorsement put by the bailiff is "notice unserved". It is not in dispute that the applicant was serving at the relevant time. The learned counsel for the applicant states that the date on which the summons was served was a working day as it was a Thursday. It is not in dispute that even after the aforesaid decree, the husband continued to reside with the wife for 18 months in the same house and thereafter took out proceedings for taking possession by getting himself out from the premises. It was a working day and naturally the applicant who is residing in the same house with the husband, would never expect that the husband will go the Court from

the house straightway for filing an application for divorce.

12. It is not in dispute that even in the Tata AIG Life policy form which the husband has signed it, clearly shows that the name of the nominee is shown to be the applicant/wife and that form has been filled after six months from the so-called divorce of decree.

13. The aforesaid factual aspect makes the case absolutely clear that in the instant case, the Respondent tried to keep secret regarding the fact of divorce decree from the wife for a long time and subsequently tried to take out proceedings after about 16 months since decree of divorce was passed. In the meanwhile, they continued to remain as husband and wife even as per the certificate issued by the Cooperative Housing Society where the house is located.

14. It is required to be noted that the present application is filed before this Court on 9 March 2012. The Respondent/husband filed caveat and subsequently remarried on 9 April 2012 and the summons of this Civil Application was served on 11 April 2012. Whether the second marriage is valid or not or what is its effect is not required to be examined in this application. In our view, the applicant has made out a sufficient ground for condonation of delay as, in our view, from the documents and evidence, it is clear that the trial Court had not taken care to find out whether the court summons was legally served and there is an endorsement that it is unserved. It is an admitted fact which is not denied by the Respondent that there is nothing on record to show that the bailiff has tried to identify the person before putting an endorsement on summons, nor any neighbours were called, nor husband was present and in whose presence the court summons was served.

15. It is well known proposition of law that fraud vitiates everything. In a given case, delay of few days may not be condoned and in a given case, delay of years can be condoned, as per the facts of the case. The Court is required to consider such aspect from case to case basis.

16. Considering the conduct of the Respondent as we have indicated above and considering the report of the bailiff which is prima facie suggestive of the fact that it cannot be said to be a valid service of summons so far as the wife is concerned. Under these circumstances, we are inclined to condone the delay. Accordingly, Civil Application is allowed. The delay in filing the Family Court Appeal is condoned. We may clarify that the observations made hereinabove, should be construed only for deciding the delay condonation application.

17. In view of what is stated above, the Civil Application is disposed of and the Rule is made absolute accordingly. There shall be no order as to costs. The copy of this order may be served on all the Family Court Judges in the State so that in future proper care can be taken when there is an endorsement of refusal of notice, before hearing and/or taking decision on the Petition for divorce on exparte basis.