

(1984) 10 KAR CK 0002
In the Karnataka High Court
Case No : M.F.A. 340 of 1982

Nagarathnamma M.L.

APPELLANT

Vs

S.R. Suryanarayana Rao.

RESPONDENT

Date of Decision : 09-10-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 20

Citation : (1985) 1 KarLJ 136

Hon'ble Judges : S. R. Rajasekhara Murthy, J;G. N. Sabhahit, J

Judgement

Sabhahit, J.-This Appeal by the respondent-wife is directed against the judgment and decree dated 17.9.1981 made by the Civil Judge, K.G.F., in G&W/3/1980 on his file allowing the petition and ordering respondent-wife to deliver the minor-children-Sham and Prith to the custody of the petitioner.

The application under Sec. 6 of the Hindu Minority and Guardianship Act r/w Sec. 25 of the Guardian and Ward Act, 1880, was instituted before the District Judge, Kolar-Gold-Fields by the husband S.R. Suryanarayana Rao. He averred in the petition that respondent in the petition, namely, Smt. M.L. Nagarathnamma was his legally wedded wife and their marriage took place in the month of August 1969, that after the marriage they lived together as husband and wife and out of their wedlock two children were born to them. The first child is a son by name Sham and he is aged 13 years. He is studying in the middle school, and the second child is a girl aged about 9 years. Misunderstandings, however, developed between the husband and the wife, and the husband was forced to file a petition for restitution of conjugal rights before the Civil Judge, Kolar, in M.C. 15/1971 and the petition was allowed. But the respondent-wife did not join him inspite of a decree. Thereafter, the wife filed a petition for maintenance under Section 125 Cr. P.C., before the Metropolitan Magistrate, III Court, Bangalore, and the husband is paying maintenance according to the order.

It is the case of the husband that his wife is residing in a village and the children are not getting proper education, so he sought for the custody of the children by

the application made before the District Judge. He is a lecturer in the Junior College and he is interested to take proper care of the children. Thereafter, the case was transferred to the Court of the Civil Judge, K.G.F.

The learned Civil Judge observed, that though the respondent was duly served she did not appear before the Court and she was placed ex-parte. The husband was examined thereafter as P.W. 1 and he closed his side. Appreciating the evidence of the husband, the learned Civil Judge allowed the petition by his judgment and decree, as stated above. Aggrieved by the said judgment and decree, the respondent-wife has instituted the above appeal before this Court.

Learned Counsel-Shri Kulkarni, appearing for the Appellant strenuously urged before us that the learned Civil Judge was not justified in observing that the summons of the case was duly served on Smt. Nagarathnamma, the present appellant. According to him, she was not served at all, and, hence the judgment and decree passed against her in her absence and without notice to her could not be allowed to stand. As against that the learned Counsel appearing for the respondent-husband did not have serious objection to the case made out by the appellant.

It is seen from the order-sheet of the Trial court that on receipt of the records, the learned Civil Judge issued court-notices to the parties. The order was passed on 22.8.1981. The Court-notices, however, were returned as the Court to which they were sent had no jurisdiction to serve. On 7.2.1981, it is written in the order-sheet, C.N. to respondent returned as she was transferred. C.N. to petr. not returned. On 12.3.1981, it is written: Notice to respondent issued returned unserved as she was transferred, and, thereafter, on 1.6.1981, it is written, Notice to respondent returned for want of residence as she has left the address. On 13.7.1981 it is written: Notice to respondent issued by R.P. Cover returned unserved. Respondent not found during the delivery time. The case was kept for steps by 25.7.1981 and on 6.8.1981 an application-I.A.I. was given for substituted service. It was allowed. On 3.9.1981 it is written: notice to respondent by sub-service duly publishing by beat of Tom-Tom, respondent absent exparte"

It is that way that the learned Civil Judge observed in the course of his judgment that the respondent remained absent though duly served. This observation was seriously challenged before us by the learned Counsel for the appellant. When the Court notice was sent to respondent first, it was sent to her teacher address as a teacher at Masti in Malur taluk. It was returned with a "shara" "transferred", and subsequently, without making any enquiry as to whether she was transferred, notice by "Registered Post" was sent to her as, c/o M. Lakshminarayana, 924-B/B, 4th Block, Rajajinagar, Bangalore-10. That was returned with a "shara", "not found during delivery time". It is, thereafter, that an application for sub-service was presented before the court as per I.A.I for sub-service. I.A.I is supported by an affidavit. In the affidavit, it is stated; inter alia, thus:

"I swear that the respondent is purposefully evading the process of the court with intent to delay the execution of the decree that may be passed against her in the case. She is working in the Primary School at Masthi.

Hence, I swear that it is necessary in the ends of justice that this Court may be pleased to order summons by Sub-service by beat of tom-tom at the Primary School, at Masti, Malur taluk"

It is on the basis of this that the learned Civil Judge ordered the sub-service.

Order 5, Rule 20 states:

"20. Substituted service,-(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the court shall order the summons to be served affixing a copy thereof in some conspicuous place in the Court house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last-resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit"

Thus, the Rule is clear that before sub-service is ordered, the Court should be satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that there should be some other reason for not serving summons in the ordinary way.

It is seen from the facts of the case that when the Court notice was sent, it was returned stating that the lady was transferred from Masti, and hence, summons could not be served. There is no question of avoiding service. In the normal course, enquiry should have been made or got made through the petitioner as to where she was transferred and summons should have been issued to her proper address. Instead of that, summons were sent to Rajajinagar address where obviously she was not residing and it was returned stating that she was not found for service. Thus, if the learned Civil Judge has applied his mind it should have been clear to him that there was no attempt on the part of the wife, present appellant, to evade service or that there was any reason for not effecting service of summons on her.

This Court, in *R. MUNISWAMI NAIDU v. L. THIRUNAVAKKARASU & Another*-(1966(2) Mys. L.J. 708), has ruled by a Division Bench that, "before a notice by substituted service could be ordered the Court must be satisfied that there was reason to believe that the respondent was keeping out of the way for the purpose of avoiding service, or that for any other reason the summons could not be served on him in the ordinary way". The Division Bench, speaking through Hegde, J: (as he then was), has further observed that, "the Court must apply its mind and see whether there was a case for issuing notice by substituted service. The manner in which notice by substituted service should be issued must also be decided by the Court".

In the instant case, therefore, it is obvious that the Court did not apply its mind and there is nothing to show that the Court was satisfied that the present appellant was trying to evade service or she could not be served in the normal way. The Court has proceeded to pass the order almost mechanically without applying its mind allowing I.A.I for substituted service. Though, it is obvious that this was not a case where substituted service should have been ordered. Therefore, we are satisfied that there was no service at all on the present apellant-respondent in the case. The learned Civil Judge no where observed in the course of the order-sheet that the service was sufficient or that the respondent was duly served. Hence, we are constrained to hold that the judgment and order of the learned Civil Judge, behind the back of the respondent-wife, cannot be allowed to stand.

In the result, the appeal is allowed, the Judgment and order of the trial Court are set aside and the matter is sent back to the Trial Court with a direction that the Court shall take the case back on its file and giving proper opportunity to the parties shall proceed to dispose of the matter, in accordance with law.

Parties are directed to be present before the trial Court on 12.11.1984 to take further instructions.

Send back the concerned records to the trial court.

No costs of this appeal.