Krishan Vs. Smt. Sumitra

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SooperKanoon Citation : sooperkanoon.com/511796

Court : Madhya Pradesh

Decided On : Oct-31-2002

Reported in : I(2003)DMC731

Judge : A.K. Gohil, J.

Acts : Hindu Marriage Act, 1955 - Sections 28; Code of Civil Procedure (CPC) , 1908 - Order 5, Rules 17 and 19

Appeal No. : First Appeal No. 63 of 1992

Appellant : Krishan

Respondent : Smt. Sumitra

Advocate for Def. : M.L. Agrawal, Adv.

Advocate for Pet/Ap. : M.K. Jain, Adv.

Disposition : Appeal allowed

Judgement :

A.K. Gohil, J.

1. This appeal tinder Section 28 of the Hindu Marriage Act has been filed by the husband against the judgment and decree dated 22.2.1992 passed by III Additional District Judge, Ujjain rejecting his petition/suit for grant of divorce.

2. Admittedly, the marriage between the parties took place on 19.4.1974 and from July, 1976, the respondent-wife is residing separately. The petition for divorce was filed on the ground of cruelty, desertion and adultery. The respondent-wife was ex parte before the Court below as the notice was refused by her. Even then the Trial Court has dismissed husband's petition as he failed to prove the allegations levelled against the respondent-wife. This Court also tried for reconciliation but it failed and the Court has recorded that there is no possibility of any reconciliation between the parties.

3. Learned Counsel for the appellant submitted that when there was no possibility for reconciliation between the parties, the Court below ought to have granted a decree for divorce. In support of his contentions he has placed reliance on a Division Bench decision in the case of Rajendra Agrawal v. Smt. Sharda Devi Agrawal, 1992 JLJ 289, in which it has been held that if there is no possibility for any reconciliation, the Court should grant a decree for divorce. In reply, the submission of the learned Counsel for the respondent is that in this case the Trial Court has not followed the mandatory provisions of law for recording refusal of summons by the respondent-defendant. Mr. Agrawal has taken a technical objection that though the summonses were refused by the respondent-defendant, but the Court below has not applied the provisions of Rules 17 and 19 of Order 5, C.P.C., according to which in case of refusal of service of summons, the same has to be affixed in the presence of the witnesses and a report has to be endorsed by the Process Server in that regard on affidavit. It is also to be reported by the Process Server that by whom the house of the defendant was identified and in whose presence the copy of summon was affixed. On the refusal to receive the summons by the defendant, a further inquiry by the Trial Court was necessary Under Rule 19 of Order 5 where summons is returned Under Rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings and may make such further inquiry in the matter as it thinks fit, and shall either declare that the summons has been duly served or order such service as it thinks fit. Since the Court below has not applied the aforesaid mandatory provisions, the service by refusal cannot be held to be proper under the law. The Counsel for the

respondent further submitted that since there is no valid service on the defendant, the Trial Court has wrongly proceeded ex parte against the respondent.

4. Having heard the learned Counsels for the parties and after perusal of the record of the Court below, I am of the view that the Trial Court had not followed the mandatory provisions prescribed Under Rules 17 and 19 of Order 5, C.P.C. I have also perused the order-sheet of the Trial Court. The suit was filed on 7.1.1992. On the same day, notices were issued for 17.1.1992 and on the report of the Process Server that the respondent-defendant has refused to receive the notice, the Trial Court proceeded ex parte against the respondent-defendant. The Process Server has not filed his own affidavit as required under the rules nor the Court has verified the same nor recorded his evidence nor the summons was affixed as required under the law. Therefore, it is true that the Trial Court has not made any compliance of the provisions of law and has wrongly proceeded ex parte against the respondent-defendant. In view of the aforesaid factual position on record that the summons were not properly served on the respondent-defendant, the petition/suit should not have been heard and decided on merits. Accordingly, this appeal is allowed. The impugned decree passed by the Court below is set aside and the case is remanded to the Court below (Family Court) to decide the same afresh. (As per the submission of the Counsel for the appellant, now the Family Court has been established and started functioning at Ujjain). Since Mr. Agrawal is appearing on behalf of the respondent, no fresh service is necessary on the respondent in the Court below. Both parties are directed to appear before the Family Court, Ujjain on 25.11.2002 and thereafter the Trial Court shall hear this case on day to day basis and complete the same within a period of three months from 25.1.2002 as the parties are residing separately since 1976 and this petition for divorce was filed in the year of 1992. The respondent shall be free to file written statement either on 25.11.2002 or lastly within 3 weeks from 25.11.2002 and thereafter the Court shall frame necessary issues, record the evidence of the parties and decide the same. The record of the Court below be returned back immediately. Parties shall bear their own costs.

C.C. to both the parties in 3 days.