

IN THE HIGH COURT OF JHARKHAND AT RANCHI

(Civil Appellate Jurisdiction)

First Appeal No. 48 of 2019

Khushbu Devi @ Kumari Khushbu, wife of Shekhar Kumar Swarnkar,
daughter of Shankar Prasad Sah, resident of Pachna Road, Lakhisarai,
PO&PS Lakhisarai, District Lakhisarai, Bihar**Appellant**

Versus

Shekhar Kumar Swarnkar, son of Hirender Prasad Swarnkar, resident of
Dalkuan Gali, College Road, PO Sahibganj, PS Sahibganj (T), District
Sahibganj, Jharkhand **Respondent**

**CORAM: HON'BLE MR. JUSTICE SHREE CHANDRASHEKHAR
HON'BLE MR. JUSTICE RATNAKER BHENGRA**

For the Appellant : Ms. Ayushri, Advocate
For the Respondent : Mrs. Rajlakshmi Mishra, Advocate

ORDER

02nd November 2022

Per, Shree Chandrashekar, J.

Kumari Khushbu whose marriage was solemnized with Shekhar Kumar Swarnkar in the year 2014 is aggrieved by the order dated 18th August 2018 passed in Original Suit No. 89 of 2018 (in short, "Restitution Suit").

2. By the aforesaid judgment dated 18th August 2018 the Restitution Suit filed by the respondent was allowed *ex-parte* against the appellant.

3. In the order dated 18th August 2018, the Family Court has recorded as under:

"9. Three essential conditions for Section 9 of HMA

✓ *Firstly, one party must have withdrawn from the society of the other,*

✓ *secondly, the withdrawal must be without any reasonable reason,*

✓ *and thirdly, the aggrieved party applies for the restitution of conjugal rights.*

10. On close scrutiny of the ex-parte evidence brought on record through affidavit in this case, it is clear that

➤ *The defendant is legally married wife of the plaintiff. Out of their conjugal union a daughter was born, who is about 3 years old.*

➤ *Presently, the defendant is not residing with the plaintiff rather she has been residing at her parental place.*

➤ *The plaintiff and his witnesses have consistently stated that they did not know the reason behind the defendant's departure from her matrimonial house.*

➤ *The plaintiff and his witnesses have consistently stated that they tried at their level best to take defendant to her matrimonial*

house but she refused to come.

➤ The defendant has not come in this court even having received notice to put her stand.

11. Marriage is just not only a ceremony; it also includes various marital duties and legal rights associated with it. One of the fundamental purposes of marriage is that the spouses live together and one spouse is entitled to the society and comfort. A cause of action, therefore, arises when one party to the marriage withdraws from the society of the other without reasonable and just cause and excuse would be proceeded against by the other in the court of law praying for a decree of restitution of conjugal rights. The expression 'conjugal rights' connotes two ideas:

i. Right of couple to have each other's society, and

ii. Right to marital association

12. In the case at hand, which is being heard as *ex-parte*, there is obviously nothing on record to reveal that the defendant has any legal cause to deprive the plaintiff from his conjugal rights. Hence, in the aforesaid circumstances, it is hereby ordered that the suit be and the same is decreed *ex-parte*. A decree of restitution of conjugal rights is granted to the plaintiff. The defendant is directed to join the company of the plaintiff within 60 days from the date of preparation of decree.”

4. Ms. Ayushri, the learned counsel for the appellant has contended that the *ex-parte* judgment by the Family Court is liable to be set aside on the ground that there was no material before the Family Court to hold that summons was duly served upon the appellant on 21st May 2018.

5. The original records of the Restitution Suit have been called from the lower Court and we have perused the same. The Family Court has recorded its satisfaction about service of summons in the order dated 28th June 2018 which reads as under:

“28.06.2018 : Case called on. Plaintiff files his attendance and present in the court.

Tracking report of notice issued through speed post to the defendant, shows that item has been delivered to the addressee on 21.05.2018. On the basis of this report it is hereby held duly served.

Notice has been served to the plaintiff on 21.05.2018 and it shows that notice has been served one month earlier sufficient opportunity has been given to the defendant for his appearance.

Hence it is hereby ordered to be proceeded *ex-parte*. Put up on 05.07.18 for plaintiff evidence *ex-parte*.”

6. A mere glance at the aforesaid order reveals that on the basis of a tracking record the Family Court has considered delivery of summons upon the appellant valid. Before that day, the suit was kept pending awaiting appearance of the appellant and, quite obviously, there was not report on service of summons upon the appellant. Not only that, by the same order the Restitution Suit was set for *ex-parte* hearing against the appellant and was fixed for 5th July 2018 for the plaintiff's *ex-parte* evidence.

7. Order V Rule 1 of the Code of Civil Procedure (in short, CPC) provides that a summons may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any, within 30 days from the date of service of summons on that defendant. Rule 9 which provides the procedure for service of summons lays down that where the defendant resides within the jurisdiction of the Court in which the suit is instituted the summons shall unless the Court otherwise directs be delivered or sent either to the proper officer to be served by him or one of his subordinates or to such courier services as are approved by the Court. It is noteworthy to record that by the Code of Civil Procedure Amendment Act, 2002 the provision for service through courier services has been incorporated in Rule 9 to Order V CPC to facilitate expeditious disposal of the suits. Sub-rule (2) to Rule 9 clarifies that the proper officer may be an officer of the Court other than that in which the suit is instituted. Sub-rule (4) further clarifies that where a defendant resides outside the jurisdiction of the Court in which the suit is instituted, and the Court directs that the service of summons on that defendant may be made by such mode of service of summons as is referred to in sub-rule (3) then the provisions of Rule 21 shall not apply – except, in case of registered post acknowledgment due. Under sub-rule (3), service of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgment due or by speed post or by such courier services as are approved by the High Court or by the Court under sub-rule (1) or by any other means of transmission of documents including fax message or electronic mail service as provided under the High Court Rules.

8. The aforesaid mode of services of summons under Rule 9 shall have different requirements upon fulfillment of which the Court may infer or hold that summons was validly served upon the defendant. A valid service of summons upon the defendant is the most important step during 1st stage of any trial and the reason is obvious. It is a fundamental requirement in law that no one should be condemned unheard and therefore no trial of either nature, civil or criminal, can proceed without notice to the other side. For more than one reason, a tracking record cannot be the conclusive proof of valid service of summons upon the defendant. In the first place, a tracking

record is required to be placed by the Registry before the Court and it must form a part of the records of the case. Secondly, a tracking record must be supported by an affidavit of Nazir or any other officer of the Court authorised in this behalf. In certain cases, the plaintiff may also lead evidence regarding service of summons with the help of the tracking record. There are other requirements under Rule 9 which have also to be considered by the Court concerned before service of summons upon the defendant is held valid.

9. Sub-rule (5) provides that there should be an acknowledgment or any other receipt signed by the defendant or his agent, or, where the postal article containing the summons has been received back by the Court the same shall contain an endorsement by a postal employee or by any person authorised by the courier service to the effect that the defendant or his agent had refused to take delivery of the postal article or had refused to accept the summons by any other means specified in sub-rule (3) when tendered or transmitted to him. In case where summons has been returned unserved or has been refused by the defendant, under Rule 19 the serving officer shall be examined by the Court.

10. The proviso to sub-rule (5) provides that the Court may declare that summons has been validly served upon the defendant notwithstanding the acknowledgment having been lost or mislaid or for any other reason if the same has not been received by the Court within thirty days from the date of issue of summons, provided the summons was properly addressed, pre-paid and duly sent by registered post acknowledgment due. The acknowledgment or postal receipt is required to be brought on record for another reason also. Under Rule 15 service of summons upon any adult member of the defendant's family is considered valid service upon the defendant. However, explanation to Rule 15 provides that a servant is not a member of the family within the meaning of this Rule and therefore the Court before holding valid service of summons upon the defendant is required to see to whom the summons was served.

11. The record of proceedings in the Restitution Suit does not give even an inkling about the aforesaid procedure having been followed by the Court before the Restitution Suit was set for *ex-parte* hearing against the

appellant. For the aforesaid reason, the judgment in Restitution Suit is seriously flawed in law and the order dated 28th June 2018 has been rendered illegal.

12. Therefore, the judgment dated 18th August 2018 passed in Original Suit No. 89 of 2018 is set aside.

13. First Appeal No. 48 of 2019 is, accordingly, allowed.

14. Consequently, Original Suit No. 89 of 2018 is restored to its original file. The Family Court shall give notice to the appellant and on her appearance grant sufficient opportunity to lead evidence, if she desires.

(Shree Chandrashekhar, J.)

(Ratnaker Bhengra, J.)

Jharkhand High Court, Ranchi

Dated: 2nd November 2022

RKM/ N.A.F.R