IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

FAO(Ord.)No.47 of 2001

Reserved on 20.9.2006

Date of decision 29.9.2006

Smt.Chandra Vati. Appellants

Vs.

Smt. Pushpa Devi and others Respondents

Coram:
The Hon'ble Mr. Justice Deepak Gupta, Judge.

Whether approved for reporting?[1] No.

For the appellant : Mr. B.K.Malhotra, Advocate.

For the respondent(s): Mr. Anuj Nag, Advocate, for respondents No.1 to 6.

Mr. Rajesh Mandhotra, Advocate, for Respondents No. 7 to 11.

Deepak Gupta J.

Appellant Smt. Chandra Vati (Appellant herein) was married to one Sh.Inder Dev. The husband filed a petition for grant of divorce on the ground of desertion and cruelty against the appellant in the court of the District Judge, Mandi. This petition was instituted on 19.11.1992. It appears that various attempts were made to serve the wife at her address in Mandi Town. These attempts were not successful and finally a notice

---

[1] Whether reporter of local papers are allowed to see the judgment ? Yes

was sent to the petitioner at her address in U.S.A. On 13.5.1993 the trial court passed the following order :

> "13.5.1993. Present:- Petitioner in person.
>
> The notice purports to have been posted to the respondent on 12.4.03. However, the undelivered envelope containing the notice or the A.D. has not been received back. Since more than 30 days period has elapsed, and the envelope has not been received back, therefore, it is presumed that the registered letter has been duly delivered to the respondent. Since none is present for the respondent, therefore, she is proceeded against ex parte. Be listed on 17.6.93 for exparte evidence of the petitioner."

Thereafter exparte evidence was recorded and a decree for divorce was passed in favour of the husband and against the wife on 12.8.1993.

It would be pertinent to mention that the husband expired sometime in 1995.

The wife on 23.2.1998 filed an application under Order 9 Rule 13 CPC for setting aside the exparte decree and in this application it was averred that no valid service had been effected on the applicant and that she came to know about the judgment and exparte decree only on 12.2.1998. She at once applied for copies of the judgment and decree and the same were received by her on 16.2.1998 and thereafter the application for setting aside was filed and the same was within limitation from the date of knowledge.

This application was contested by the respondents No.1 to 6 who are the two other wives of the husband and his children from them. Respondents No.7 to 11 are the children of the husband Inder Dev from

the appellant. Thereafter the learned trial court framed issues and recorded evidence and after hearing arguments has dismissed the petition on the ground that the petitioner has failed to show sufficient cause for setting aside the exparte decree and also on the ground that the petitioner has failed to substantiate her allegations about the exact date when she attained knowledge of the exparte decree.

I have heard Mr.B.K.Malhtora learned counsel for the appellant and Mr.Anuj Nag learned counsel for respondents No.1 to 6. Mr.Malhotra has urged that the learned trial court has gravely erred in relying upon the record of the original divorce proceedings. According to him the proceedings for setting aside exparte decree are independent proceedings and the material on the file of the divorce proceedings could have been read in these proceedings. He further submits that there is no proof that the appellant was served and according to him the proper procedure under Order 5 CPC was not followed. He submits that notices under Order 5 Rule 19-A CPC can only be issued by registered post simultaneously along with the ordinary process. He lastly submits that since the respondents have failed to prove that the summons were actually sent at the correct address through an adequately stamped envelope by registered post and as such no presumption can be raised that the petitioner appellant had been served. In the alternative he submits that even if such a presumption is raised the same stands rebutted once the appellant stepped into the witness box and made a statement on oath that

she had not received the notice. On the other hand, Mr.Anuj Nag has supported the judgment of the learned trial court.

A perusal of the statement of the appellant before the trial court shows that she was out of India from March, 1992 till 1995 and that she remained with her daughter in U.S.A. during this period. She states that she never received any notice of the divorce petition and came to know about the decree passed in these proceedings in the year 1998 when the respondents filed a case with regard to the pension of late Sh.Inder Dev before the Tribunal. She further avers that then she came to know that she will not receive any pension and that her husband had obtained an exparte decree of divorce. Thereafter she obtained the papers from the court.

I have given my careful consideration to the matter and in my opinion the statement of the appellant does not inspire confidence. The husband died in 1995 and till 1998 the appellant had admittedly not received any pension. She gives no explanation as to whether she made any inquiry with regard to the pension of her husband or not. The petition for setting aside the exparte decree has been filed more than five and half years of the passing of the decree and after the death of the husband. In the petition as well as in her statement in court the petitioner states that she was not aware about the decree and was told about the same in February, 1998 by respondents No.1 to 6. This fact was denied by the contesting respondents. Surprisingly, when Pushpa Devi appeared in the

witness box as RW-1 no suggestion was put to her that she or any of the other contesting respondents had told the appellant about the passing of the decree. In her statement in court the petitioner appellant makes mention of proceedings before the Administrative Tribunal but neither any details of such proceedings have been produced in court nor any specific averment has been made as to when she came to know about those proceedings. Therefore in my view the case of the appellant that she was unaware of the passing of the decree is totally incorrect. The petition for setting aside the exparte proceedings was therefore miserably time barred and liable to be dismissed on this short ground.

Since I have held that the petition was time barred I need not go into the other facts but since lengthy arguments have been addressed I am deciding all the points raised. The first point raised by Mr. Malhotra is that the proceedings to set aside the exparte decree are independent of the suit. He further submits that therefore the record of the original divorce petition could not be gone into while deciding the question whether the service was proper or not. There can be no manner of doubt that proceedings in an application under Order 9 Rule 13 CPC are proceedings independent of the suit. However, these proceedings are inextricably linked with the suit. The question, which is normally raised in such cases is whether proper service was effected upon the person against whom exparte decree was passed. In my opinion, this question can be best decided by just summoning and perusing the record of the

original suit and no evidence to prove the record of the suit is required. Under Section 114(e) of the Evidence Act there is a presumption that all judicial and official acts have been regularly performed. It is for the person who challenges the correctness of the judicial act to show that the judicial act has not been properly performed. If that person contests the validity of a judicial of official act he must lead evidence in this regard and not the other way around.

The next contention is that under Order 5 Rule 19-A CPC as it then stood the summons by registered post could only be issued simultaneously with summons issued in ordinary course and if both were not simultaneously issued the service by registered post was improper. Mr. Malhotra has cited Union of India v. Sri Laxmi Oil Mills, AIR 1984 Patna 252, in this regard. This argument is without any basis. Each case has to be decided on its own facts. In the present case admittedly the appellant was living in U.S.A. She could not have been served through ordinary process and the only way of serving her was by issuing summons to her by post either under Order 5 Rule 19-A or under Order 5 Rule 25 CPC. As such there could not have been any valid order directing her to be simultaneously served through ordinary process.

The next contention raised is that there is no evidence that the summons were actually sent at the correct address of the appellant. The learned trial court has perused the entire record. I have already quoted the order-dated 13.9.1993. The exparte judgment has been exhibited was

filed by the plaintiff herself and exhibited as PW1/A. In paragraph 3 of the said judgment also it has been clearly mentioned that the process was issued to the appellant under registered AD vide postal receipt dated 2.4.1993 for appellant on 13.5.1993. This has to be read in conjunction with the order dated 13.5.1993. As already observed above, there is a presumption that judicial acts have been performed properly. Therefore it will have to be presumed that notices were sent by registered post at the address furnished by the husband mentioned in the process fee. Normally, the court agency issue notices at the address given by the party. On 29.3.1993 the court had ordered that notices be issued at the correct address for 13.5.1993. On 2.4.1993 the husband filed the process fee and in this the address of the appellant was given as under:

> Mrs. Chandra Vati
> C/o Neelam Prinja,
> 140 Weckerson, RD 258,
> SP Ring Valley Newyark, 10977 U.S.A.

A presumption has to be raised that the notice was sent on this address. The wife when she appeared in the witness box did not utter a word that the address given was not correct. The appellant was the best person to depose about her correct address in U.S.A. Only she was aware where she was residing. She did not challenge the correctness of the address furnished by the husband either in the petition or while appearing in the court. Mr.Malhotra has placed reliance on the judgment of this court in Ram Swarup vs. State of H.P., 1989 (1) Sim.L.C.70 and submits that it

is for the person who wants to draw presumption either under Section 27 of the General Clauses Act, 1897 or under Section 5 Rule 19-A of the Code of Civil Procedure to prove that the letter sent, was properly addressed and stamped. Normally this would be the correct position of law. However, here we are dealing with a case where the letter was sent by the court and a presumption about the official act having been performed properly must be drawn. It also needs to be mentioned that the case cited related to proceedings under the Prevention of Food Adulteration Act. The question which cropped up for consideration in that case was whether the prosecution must prove that the report of the public analyst was sent to the accused at his proper address or not. The postal receipt did not depict as to at what address the report was sent. It was in such circumstances that the court held that no presumption can be raised. In a criminal case where a party can be sent to jail obviously such presumption cannot be easily drawn. In the present case the address given in the process fee and the orders of the court clearly show that the notice was sent at the given address. There is no merit in this contention.

Lastly, it was contended that since the appellant has made a statement that she was not served therefore the presumption if any stands rebutted. In this regard, Mr.Malhotra has cited a judgment of the Delhi High Court of case Jagat Ram Khullar and another vs. Battu Mal, AIR 1976 Delhi 111. In that case again the dispute about the service related to a notice issued by the landlord regarding the termination of the tenancy.

The presumption was sought to be raised under Section 114(f) of the Evidence Act. Here again the facts are different and in the present case the question is with regard to the performance of the official acts done through the agency of the court. Furthermore, as I have observed above, the statement of the appellant herself does not inspire confidence. She does not appear to speaking the truth and thereafter the presumption in the present case in my view does not stand rebutted.

Keeping in view the aforesaid facts, the appeal is without any merit and the same is dismissed. No order as to costs.

September 29 ,2006(g) **(Deepak Gupta), J.**