



**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT  
JODHPUR**

**D.B. Civil Misc. Appeal No. 1888/2023**

----Appellant

Versus

----Respondent

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|                   |   |                                                  |
|-------------------|---|--------------------------------------------------|
| For Appellant(s)  | : | Mr. Kshitij Vyas with<br>Mr. Sukhadev            |
| For Respondent(s) | : | Mr. Siddharth Mewara with<br>Mr. Ramawatar Singh |

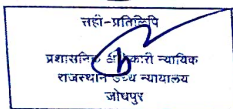
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**HON'BLE MR. JUSTICE DINESH MEHTA  
HON'BLE MR. JUSTICE SANDEEP TANEJA**

**Judgment**



**REPORTABLE**



**19/09/2025**

**Per Hon'ble Dinesh Mehta, J. (Oral):**

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1. The present appeal has been preferred against the ex-parte judgment and decree dated 15.09.2023 passed by the Family Court No.1, Bhilwara (hereinafter referred to as 'the Family Court'), whereby application under section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act of 1955') filed by the respondent-wife has been allowed and a decree of divorce has been granted.
2. Mr. Kshitiz Vyas, learned counsel for the appellant invited Court's attention towards the proceedings of the Family Court and



pointed out that on 04.07.2023, the notice was issued in two sets, one to be sent through regular post and another through registered A.D. post and on 18.08.2023, the Family Court has treated the services of notice to be complete by observing that the envelope, which was sent by the registered post has returned with the note of 'refusal'.

3. Learned counsel took the Court through the report of the process server which was sent in the Gujarati language - typed and translated copy whereof has been appended in the memo of appeal at Page No. 30 and underscored that the report of the process server clearly mentioned that the notice was offered to [REDACTED] the mother of the appellant, who had stated that [REDACTED] is her son (appellant) and that he had gone to Ahmedabad and also that she did not know when would he come back so also that the mother of the appellant had clearly stated that the envelope related to the court proceedings and hence, she would not accept the same.



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4. Having highlighted above aspects, Mr. Vyas, learned counsel argued that while drawing the ex-parte proceedings, the Family Court relied on the track report with respect to the other notice, which was perhaps sent through the registered A.D. post, on which the word 'refusal' was written. He argued that report of the process server clearly shows that the notice was offered to appellant's mother and she had refused to accept the same, as the same was from the Court. He argued that the same cannot be treated to be refusal of the notice by the appellant.

5. Learned counsel further argued that while drawing the ex-parte proceedings, the Family Court has wrongly observed that the



service report of the envelope, which was sent through regular post has been received. He contended that report of a post sent through regular post is never issued by the Department of Post.

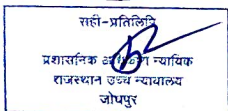
6. Learned counsel argued that even after deciding to proceed ex-parte against the appellant on 18.08.2023, the Family Court posted the matter on 12.09.2023 and thereafter, immediately within a period of two days concluded the proceedings and passed the ex-parte decree. He argued that the Family Court has not only drawn the conclusion of sufficient service erroneously, but has also proceeded in haste and passed the ex-parte decree of divorce, due to which the appellant's right to contest the petition under section 13 of the Act of 1955 has been closed.

7. Mr. Siddharth Mewara, learned counsel appearing for the respondent-wife on the other hand submitted that the refusal on the part of the mother of the appellant being a major member of the family, should be taken to be a sufficient service.

8. Learned counsel further submitted that the track-report of the registered post clearly shows that the envelope was refused and therefore, the Family Court has committed no error of law or of facts in treating the service of notice to have been duly completed.

9. In support of his aforesaid contention, learned counsel relied upon the judgment of Hon'ble the Supreme Court passed in the case of **C.C. Alavi Haji vs. Palapetty Muhammed & Ors.**, reported in **(2007) 6 SCC 555**.

10. Heard learned counsel for the parties and perused the record including the record of the Family Court, which was summoned by this Court.



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11. The Family Court has drawn presumption of service of the notice, on the basis of endorsement 'refusal' found on the envelope, which was sent to the appellant – husband. Though the notice was sent on the correct address, but the note on the envelope does not show as to who refused to take the notice.

12. On perusal of the original envelope containing notice, which was sent by the Family Court to the appellant, at his address at Sabarkantha, Himmatnagar, Gujarat, we find that there is endorsement of the Postman going to appellant's address on 15.07.2023; 17.07.2023; 18.07.2023; 19.07.2023; 20.07.2023 and 21.07.2023. True it is, that a seal has been affixed on the said envelope on which the black mark for 'refused' has been ticked. If the appellant's family member or mother had to refuse the same, they could have at the first instance refused it. The fact that the envelope shows remark of approaching the addressee on six occasions is indicative of the fact that the addressee was not at the address, as claimed by him.



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13. If we advert to the record and service report of the process server, we find that the notice was offered to the mother of the appellant, who had in express terms stated that the appellant (her son) had gone to Ahmedabad and is not available in the house.

14. According to us, such stand of the appellant's mother cannot be said to be a 'refusal' by the appellant, more particularly, when the notice was not at all offered to the noticee – the appellant.

15. A perusal of the letter/report dated 04.08.2023 sent by the Additional District Judge, Sabarkantha at Himmatnagar, Gujarat (Annexure-3), makes it abundantly clear that the concerned party was not served.



16. Said letter/report dated 04.08.2023 is also available in the record of the Family Court. If the report sent by the Additional District Judge, Sabarkantha at Himmatnagar, Gujarat was considered in the backdrop of the facts obtaining, the report of the registered post ought not to have been taken to be a refusal of the notice.

17. A refusal for the purpose of service of notice should be taken to be a sufficient service, if such refusal is by the addressee or by the noticee himself/herself. A denial by any other person other than the noticee or his agent, including the mother to receive or accept the notice on someone else's behalf cannot be said to be a refusal in the eye of law.

18. We are firmly of the view that the Family Court has not properly examined the record, factual aspect of the case and has completely ignored the letter/report dated 04.08.2023, sent by the Additional District Judge, Sabarkantha, Himmatnagar, Gujarat.

19. Learned counsel for the respondent-wife has relied upon the decision of Hon'ble the Supreme Court in C.C. Alavi Haji (supra) to contend that the service of notice has been duly effected on the appellant. It is pertinent to note that decision in C.C. Alavi Haji (supra) pertains to the statutory requirement of giving a notice; in writing, to the drawer of the cheque in terms of Clause (b) of proviso to Section 138 of the Negotiable Instruments Act, 1881 and has no direct application to the present case. Firstly, because proviso (b) to section 138 requires issuance of the notice while relevant provisions given in the sub-rule (5) of Rule 9 of Order V of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') mandates service of notice.



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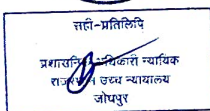
20. It will not be out of place to reproduce the relevant provisions [sub-rule (3) & (5)] of the Rule 9 of Order V of the Code of Civil Procedure with regard to service of summons to the defendant by Registered Post:

“(3) The services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgment due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the High Court or by the Court referred to in sub-rule (1) or by any other means of transmission of documents (including fax message or electronic mail service) provided by the rules made by the High Court:

Provided that the service of summons under this subrule shall be made at the expenses of the plaintiff.

(5) When an acknowledgment or any other receipt purporting to be signed by the defendant or his agent is received by the Court or postal article containing the summons is received back by the Court with an endorsement purporting to have been made 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 containing the summons or had refused to accept the summons by any other means specified in sub-rule (3) when tendered or transmitted to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed, prepaid and duly sent by



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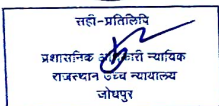
registered post acknowledgment due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of issue of summons."

21. A simple reading of sub-rule (5) of Rule 9 quoted above shows that, in the instant case, the acknowledgment of refusal, received in respect of summons issued to the appellant by registered post has been made by his mother and not the appellant himself. Furthermore, there is nothing on record to show that the appellant had authorised his mother as his agent to receive the postal article on his behalf. Therefore, the court cannot draw an inference under sub-rule (5) of Rule 9 of Order V of the Code, that the notice has been duly served on the appellant.

22. A case with somewhat identical facts and circumstances as the present case arose before the Kerala High Court in the case of **Prakash Kunhipaily Paul vs. Anila Mol Augustine & Ors., OP (FC).No. 206 of 2018**, decided on 13.09.2018, wherein it was

observed thus:-

"21. It can be contended that personal service of summons on an adult member of the family of the defendant and service of the postal article containing the summons on him practically make no difference. But, the legal consequences differ. As in the instant case, in case of service of the summons sent by registered post, the acknowledgment card may only contain the name and signature of the person who has received the postal article. Sometimes, the acknowledgment card may only contain the signature of the person who has received the postal article. Then, the court would not be in a position to



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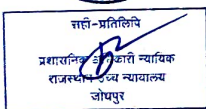


ascertain whether the service was actually effected on an adult member of the family of the defendant. The court will not be in a position know the relationship between the defendant and the person who received the summons. The court may not also know whether the person who received the summons was actually a person who was residing with the defendant. There may not also be any assurance that the postman had made repeated and earnest efforts to find out the defendant and to serve the summons on him. The court will not know whether the postman had ensured that there was no likelihood of the defendant being found at the residence within a reasonable time. On the other hand, in case of personal service of summons on an adult member of the family of the defendant, the report of the process server would contain such details and the court would be in a position to decide whether the summons was duly served or not.

... ..

... ..

33. The conspectus of the discussion made above is the following: Service of summons contemplated under Order V, Rule 15 of the Code on an adult member of the family of the defendant is personal service of summons on him/her and not service by registered post. Service of the summons by registered post, on an adult member of the family of the defendant, cannot be treated or declared as proper and valid service on the defendant.



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23. The Madhya Pradesh High Court also had an occasion to consider a similar issue in the case of **Prachi Soni Vs. Jai Prakash Sarraf F.A. No. 150/2015, decided on 09.09.2015** which reads thus.

"10. It is clear from the perusal of Rule 9 of Order V of the Code of Civil Procedure that service of summons upon the defendant by registered post acknowledgment due is permissible; however, such service is required to be

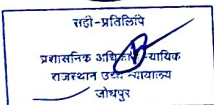


effected upon the defendant or his agent empowered to accept the service.

11. In the case at hand, admittedly, the acknowledgment that has been received back, is not signed by either the defendant Prachi Soni or her agent empowered to sign such acknowledgment on her behalf. It is admittedly signed by one Amit Soni. There is no endorsement made on the acknowledgment by the postal employee effecting service, disclosing relationship of Amit Soni with the defendant."

24. The burden to rebut the presumption has been effectively discharged by the appellant in the present appeal, as the service of notice was refused by the appellant's mother and not by the appellant – husband himself. As a matter of fact, there was no occasion for him to refuse the same. This view is further fortified on perusal of the letter dated 04.08.2023 sent by the Additional District Judge, Sabarkantha at Himatnagar, Gujarat (Annexure-3).

25. In the case of **Ajeet Seeds Limited v. K. Gopala Krishnaiah**, reported in **(2014) 12 SCC 685**, Hon'ble the Supreme Court while interpreting Section 27 of General Clauses Act 1897 and Section 114 of Evidence Act 1872 held as under :-



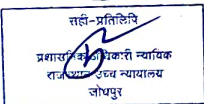
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"Section 114 of the Evidence Act, 1872 enables the court to presume that in the common course of natural events, the communication sent by post would have been delivered at the address of the addressee. Further, Section 27 of the General Clauses Act, 1897 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. It is not necessary to aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have



been effected at the time at which the letter would have been delivered in the ordinary course of business."

26. So far as reliance placed upon the judgment of C.C. Alavi Haji (supra) by learned counsel for the respondent is concerned, this Court is of the view that the facts and statutory provisions involved therein are clearly distinguishable, inasmuch as the provisions pertained to section 138(b) of the Negotiable Instruments Act, 1881 and section 27 of the General Clauses Act which dealt with the aspect of sending of notice. However, sending of notice is not synonymous with its receipt, as giving is only a process of which receipt is the culmination. Even if it is assumed that the notice was duly sent on the correct address by the registered post, it would be highly improbable for the addressee to be aware of its content when the same was neither tendered to him nor to his authorized agent, when is a pre-condition under Order V Rule 9 of the Code.



27. Our view is further fortified by the judgment of Hon'ble the Supreme Court rendered in the case of **Gujarat Electricity Board and Ors. vs. Atmaram Sugomal Poshani**, reported in **AIR 1989 SC 1433**, relevant para of which is reproduced hereinfra:-

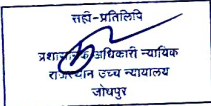
"There is presumption of service of a letter sent under registered cover, if the same is returned back with a postal endorsement that the addressee refused to accept the same. No doubt the presumption is rebuttable and it is open to the party concerned to place evidence before the Court to rebut the presumption by showing that the address mentioned on the cover was incorrect or that the postal authorities never tendered the registered letter to him

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or that there was no occasion for him to refuse the same. The burden to rebut the presumption lies on the party, challenging the factum of service."

28. Thus, insofar as the burden to rebut the presumption raised under section 114 of the Indian Evidence Act is concerned, the same has been effectively discharged by the appellant as on previous six occasions, the notice was never tendered upon the appellant or his authorized agent so as to qualify it as a valid refusal. The appellant's mother cannot be presumed to be an agent, more particularly when she had categorically refused to accept the notice on the ground that she was uncertain when her son would return. This aspect also finds support from the report tendered by the Additional District Judge, Sabarkantha, Himmatnagar, Gujarat (Annexure-3) at Page No. 28 which clearly records that the service of notice does not qualify as proper service.



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29. As an upshot of the discussion foregoing, the ex-parte proceedings drawn by the Family Court on 18.08.2023 are clearly contrary to facts and law. Consequently, the decree of divorce issued on 15.09.2023 also falls flat on the ground.

30. The appeal is, therefore, allowed.

31. The order dated 18.08.2023, whereby ex-parte proceedings have been drawn is hereby quashed and set aside and as a necessary corollary, the ex-parte decree dated 15.09.2023 is also quashed.

32. Both the parties shall appear before the Family Court on 03.11.2025. No separate notice shall be required to be issued by the Family Court to the parties.



33. On placement of the certified copy of the order instant and on appearance of the parties, the Family Court shall grant the appellant time to file written statement and thereafter, proceed in accordance with law.

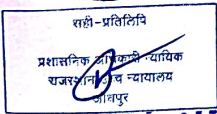
34. The record of the Family Court be sent back forthwith.

35. Stay application also stands disposed of, accordingly.

**(SANDEEP TANEJA),J**

**(DINESH MEHTA),J**

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