

IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO. 30 OF 2015

SHRI. ANTONIO MAURICIO BARRETO,
THROUGH ATTORNEY SHRI ANGALIS
PEREIRA.

... Appellant

Versus

SHRI. JANA GANESH NAIK (SIN. DEC.)
AND 3 ORS.,

... Respondents

Shri Valmiki Menezes, Advocate for the Appellant.

Shri Sandesh D. Padiyar, Advocate for the Respondents.

CORAM:- C. V. BHADANG, J.

DATE:- 8th September, 2015.

ORAL ORDER:

The appellant is the original sole defendant. The respondents/plaintiffs, have filed Regular Civil Suit No. 33/2001, against the appellant for injunction and other reliefs. The learned trial Court by judgment and order dated 31.12.2008 had dismissed the suit. That was challenged by the original plaintiffs in an appeal being Regular Civil Appeal No. 11/2009.

2. It appears that a notice was sent to the appellant (respondent before the first Appellate Court), which was returned unserved. The Roznama dated 21.04.2009 shows that as per the Bailiff Report, the notice to the respondent was unserved with an endorsement that he is working abroad alongwith his family. The subsequent order sheets show that the respondents herein, were asked to take steps for service of the appellant. The order sheet dated 16.06.2009 would particularly show that a long date was given, as the respondent was staying abroad. However, it so happened that on the subsequent date i.e. 13.07.2009, Advocate Vaz was shown present for the respondent and the order sheet records that Advocate Vaz waived service and hence, the matter was adjourned for arguments. On 27.07.2009, Advocate Vaz was absent, however on the next date i.e. on 11.08.2009, Advocate Vaz remained present and sought time to file Vakalatnama. It is significant to note that even so, on that day i.e. 11.08.2009 an application (Exhibit-D/10) came to be filed on behalf of the respondents herein, to issue fresh notice to the appellant. The notice was accordingly issued on 12.08.2009. On 05.09.2009,

another application (Exhibit-D/11) came to be made on behalf of the respondents for issuing notice to the appellant. The subsequent order sheet dated 11.09.2009 records that the appellant is served by "affixation". The order sheet dated 30.09.2009 records on the basis of the report (Exhibit-D/12) that respondent is duly served by "affixation" and the appeal was directed to proceed ex-parte. Thereafter, the learned District Judge heard the learned Counsel for the appellants and the appeal came to be allowed by judgment and order dated 13.10.2009.

3. It appears that on 01.07.2011, the appellant filed two applications one for setting aside the ex-parte judgment/order and the other for condonation of delay in filing such application. Accordingly, proceedings being Civil Miscellaneous Application No. 97/2012 were registered.

4. It was contended that the appellant is not residing in the house at Fatorpa, Balli, Horna, where the notice was affixed. It is contended that the appellant is a native of Ordhofond, Poiguinim, Canacona. It is contended that the appellant is

employed in Kuwait for last many years and was out of India as on 20.08.2009. It was contended that the appellant had no knowledge of the appeal and only at the time the Advocate of the appellant examined the file of Reg. Execution Application No. 5/2002, some time in April, 2011, he came to know about the same. In short it was contended that the appellant was not aware of the hearing of the appeal and he was not served.

5. The application was opposed on behalf of the respondents herein, on the ground that the appellant was duly served. On 30.09.2011, the respondents filed a reply denying all the adverse allegations. It was contended that it was a deliberate attempt to avoid service.

6. The learned Appellate Court by order dated 14.08.2013 has dismissed the application, which is purportedly filed under Order IX Rule 13 of the Civil Procedure Code. The Appellate Court found that on 13.07.2009, Advocate Vaz was present and had waived service. It was also found that the respondent was served by "affixation". However, it was found in para 16 on the basis of

the entries in the passport that from 09.02.2011 to 04.06.2011, the respondent was not in Goa. It was also found that the Bailiff Report dated 25.02.2009 showed that the respondent and his family were not in Goa. However, he was served by "affixation" as per the Bailiff Report dated 20.08.2009. In such circumstances, the application came to be dismissed. Feeling aggrieved, the appellant is before this Court.

7. I have heard Shri Menezes, the learned Counsel for the appellant and Shri Padiyar, the learned Counsel for the respondents. With the assistance of the learned Counsel, I have perused the record and the copies of the Roznamas produced, as also the impugned order.

8. It is submitted by Shri Menezes, the learned Counsel for the appellant that at no point of time, the appellant had instructed Advocate Vaz to appear on his behalf and as such, the fact that Advocate Vaz had waived service was inconsequential. It is submitted that subsequent to this, the respondents had sought issuance of notice, which is shown to be served by affixing it on

the house. It is submitted that once the appellant has shown that he is not staying at the said address, the fact of "affixation", cannot amount to good service.

9. It is submitted that the appellant is willing to abide by any condition as to costs, in the event, the appellant is granted an opportunity to contest the appeal before the first Appellate Court.

10. On the contrary, it is submitted by the learned Counsel for the respondents that the appellant has not produced the affidavit of Advocate Vaz. It is submitted that Advocate Vaz was appearing for the appellant before the Trial Court. It is submitted that the appellant has not made out a case that Advocate Vaz had waived service under a mistaken belief. It is contended that the Trial Court has rightly found that the appellant was served by "affixation" and as such, the impugned order does not call for any interference.

11. I have considered the rival circumstances and the submissions made. The order sheet dated 21.04.2009 would

clearly show that there was no report about non service of the appellant, on account of the fact that the appellant alongwith his family was staying abroad. As noticed earlier, the learned District Judge has also found in para 16 of the impugned order, on the basis of the entries in the passport that from 09.02.2011 to 04.06.2011, the appellant was not in Goa. The finding about the Service being good Service has to be examined on two aspects, firstly about the effect of Advocate Vaz shown to have waived service and secondly, on the aspect of the finding that the service by affixation of the notice having been held as good service.

12. Insofar as, the first aspect is concerned, it is undisputed that although, roznama records that Advocate Vaz had waived service, he had sought time to produce Vakalatnama, which was never produced. Subsequently, Advocate Vaz had remained absent. Thus, it is clear that although, Advocate Vaz waived service initially, the subsequent non production of Vakalatnama would show that in all probability, he could not obtain formal instructions from the respondent. What is significant is that, even after Advocate Vaz waived service on behalf of the respondent, the

appellants had twice sought issuance of fresh notice, for service of the respondent (Exhibits-D/10 and D/11). Thus, in all probability even the appellants, were not sure, whether they could rely on waiver of service by Advocate Vaz on behalf of the respondent. Thus, in my considered view, no reliance could have been placed on the fact of the waiver of service by Advocate Vaz. In the present case, where the petitioner claims that he had not instructed Advocate Vaz, the waiver could not have been acted upon.

13. This takes me to the second aspect. The report (Exhibit-D/12) dated 20.08.2009 reads as under:

Report

"This is to certify that I have visited at H. No. 122 Horna Fatarpa Balli to serve the show cause notice on respondent Shri Antonio Mauricio Barreto but the house of said respondent found closed with lock then I have affixed the show cause notice along with attached copies on the main door of said respondent Shri Antonio Barreto.

Hence show cause notice served by affixation."

The question is whether the appellant can be said to be served on the basis of the said report.

14. Order 5 Rule 20(1) of the Code of Civil Procedure reads thus:

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 by 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."*

15. It can thus be seen that it envisages a situation where either the Court has to record satisfaction that there is a reason to believe that the party is keeping out of the way for the purpose of avoiding service, or that for any other reason, the summons

cannot be served in ordinary way. Apparently, in this case, there is no finding that the appellant was avoiding service. Under Order 5 Rule 20(1) of C.P.C., the Court can direct the service of summons by affixing it in 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 fits. In the present case, the earlier Bailiff Report would clearly show that the appellant was staying abroad and in fact, a longer date was given for service, as the appellant was staying abroad. Thus, I find that on the basis of the report (Exhibit-D/12), the appellant cannot be held to be served. In that view of the matter, the impugned order needs to be set aside.

16. In such circumstances, the following order is passed:

(a) The appeal is allowed, subject to costs of Rs.10,000/-.

(b) The impugned order dated 14.08.2013 is hereby set aside.

(c) Civil Miscellaneous Application No. 97/2012 stands allowed. Consequently, the judgment and order dated 13.10.2009, passed by the learned District Judge, South Goa, Margao, in Regular Civil Appeal No. 11/2009 is hereby set aside.

(d) The Appeal is restored to the file of the learned District Judge, South Goa, Margao at its original number, for disposal in accordance with law.

(e) The parties to remain present before the learned District Judge, South Goa, Margao on 01.10.2015.

(f) The costs of Rs.10,000/- to be paid to the respondents herein, on or before 01.10.2015.

(g) The appeal is disposed of in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.