

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.441 OF 2016**

Shri Antonio Sergio Costa
alias Tony Costa, Son of
Shri Aleixxinho D'Costa,
Aged 46 years, Indian
National, Proprietor C & T
Entertainment Xs, having
its office at 4B/S1,
Searock Leisure, Vaingumim,
Dona Paula, Goa.

.... Petitioner

V/s

1 Mrs. Rashi Amit Mehra,
Wife of late Mr. Amit
Mehra, Aged 35 years,
businesswomen, Having
her office at 806, King
International House,
Juhu church, Juhu,
Mumbai, 49.

2 Master Adai Amit Mehra,
s/o. Mr. Amit Mehra,
Minor, Student,

Both r/o. 30, Sumeet
Bungalow, 11th Road, Juhu
Vile Parle Scheme,
Mumbai-400 049. Through
Mrs. Rashi Amit Mehra,
as legal guardian.

.... Respondents

Shri Vivek Rodrigues, Advocate for the
Petitioner.

Shri Jatin Ramaiya, Ms. Priyanka Chopdekar and
Ms. I. Santimonio, Advocates for the
Respondents.

CORAM : C.V. BHADANG, J.

Reserved on : 2nd AUGUST, 2016

Pronounced on : 9th AUGUST, 2016

ORDER :

On 20/04/2016, a notice for final disposal was issued in this case. The parties are heard and the petition is being disposed off finally.

2. The petitioner is the original plaintiff in Regular Civil Suit No.132/2010 before the learned Civil Judge Junior Division at Canacona. The respondents are the defendants in the suit. The said suit was decreed ex-parte against the respondents on 15/03/2012. The petitioner filed Regular Execution Case No.11/2012 for execution of the decree. According to the respondents, they learnt about the passing of the ex-parte decree when the notice in the execution case was served on them in September, 2012 after which

they filed CMA No.3/2012 before the Trial Court for setting aside the ex-parte decree. The Trial Court by order dated 9/07/2013 dismissed the application holding that the notice in the execution case was served on the respondents on the same address, as was mentioned in the Civil Suit. The Trial Court found that no affidavit was filed on behalf of the respondents that they were not residing at the given address, as shown in the cause title of the suit. It was found that the respondents had willfully avoided the service of the summons and the application for setting aside was filed "probably only to delay the proceedings".

3. The respondents challenged the same before the learned District Judge in MCA No.84/2013. The learned District Judge has allowed the appeal on 22/02/2016 sending the matter back to the Trial Court. Feeling aggrieved, the petitioner is before this Court.

4. I have heard Shri Rodrigues, the learned Counsel for the petitioner and Shri Ramaiya, the learned Counsel for the respondents. With the assistance of the learned Counsel for the parties, I have perused the record and gone through the order passed by the Courts below.

5. It is submitted by the learned Counsel for the petitioner that the learned District Judge could not have interfered with the order passed by the Trial Court, which was well reasoned. It is submitted that every attempt was made to serve the respondents by regular mode and when that failed, they were sought to be served by publication. The learned Counsel submits that the publication was made in daily 'Economic Times' which has a wide circulation particularly in a commercial city like Mumbai, where the respondents are residing. Thus, the Appellate Court was in error in holding that it

cannot be said with certainty that the parties subscribe to 'Economic Times' only because they had entered into business agreement, out of which the dispute arose. The learned Counsel pointed out that there was report of the bailiff on record to show that an attempt was also made to effect the service of summons at the new address of the respondents at 30, Sumeet Bungalow, 11th Road, Juhu Vile Parle Scheme, Mumbai - 400 049. However, they were not found there. It is submitted that thus the petitioner having done all that was within his powers to serve the respondents, now cannot be foisted with the trial of the suit afresh. The learned Counsel has placed reliance on the decision of the Supreme Court in the case of **P.K. Ramchandran V/s. State of Kerala & Anr., (1997) 7 SCC 556** of Kerala High Court and **Bipin H. Doshi V/s. Jawaharlal Prajapati & Ors., 1999 (3) Bom.C.R. 97**. It is submitted that the learned District Judge ought to have seen that the facts in the case of **Smt. Yallawwa V/s. Smt.**

Shantavva, AIR 1997 SC 35, are clearly distinguishable as the respondent in that case was an illiterate lady. The learned Counsel for the petitioner has pointed out to the affidavits dated 17/12/2011 and 30/11/2012 annexed to the two applications filed by the respondents in which the same address, as mentioned in the cause title of the suit, is shown. The learned Counsel also points out that the lawyer's notice was served on the same address. The learned Counsel submits that there was a delay in filing the application for setting aside ex-parte decree, which the Appellate Court could not have condoned. He, therefore, submits that the petition be allowed restoring the order passed by the learned Trial Court.

6. On the contrary, it is submitted by the learned Counsel for the respondents that the Trial Court could not have resorted to the substituted service by publication without

exhausting all other modes of regular service. It is submitted that the substituted service by publication can be allowed by way of last resort. It is submitted that the publication was also made in a newspaper which cannot be said to have a wide circulation inasmuch as the publication was made in 'Economic Times', which is normally looked into by a section of the public having business/commercial interest. The learned Counsel has submitted that the Appellate Court has rightly come to the conclusion that merely because there was a business transaction between the parties, would not lead to the conclusion that the 'Economic Times' was subscribed by the respondents. The learned Counsel has pointed out that although the bailiff report shows that the bailiff had gone to the Juhu address, there is no material to show that the summons was pasted on the office premises at Juhu. The learned Counsel points out that the service of the lawyer's notice which was in the year, 2007 cannot mean that the

business of the respondents was continued at the same office when the bailiff went to serve the summons. In so far as the affidavits annexed to the applications dated 17/12/2011 and 30/11/2012, it is submitted that, it is on the basis of the cause title of the matter. He however, points out that in the application dated 30/11/2012, in para 2, the respondents have mentioned their address as:

30 Sumeet Bungalow,
11th Road, Juhu Ville Parle Scheme,
Mumbai 400 049.

The learned Counsel has placed reliance on the decision of the Supreme Court in the case of **Perumon Bhagvathy Devaswom V/s. Bhargavi Amma (dead) by LR's & Ors in Civil Appeal No.4440/2008** and **Smt. Yallawa** (supra) and the decision of this Court in the case of **Antonio Francisco De Silva V/s. Mrs. Beatriz Noronha Cabral in Writ Petition No.447 of 2007**. It is submitted that there is no prohibition for the

Appellate Court permitting the delay in filing the application, being condoned.

7. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out.

8. The legal notice prior to the institution of the suit is dated 1/11/2007 in which the respondent is described as under:

M/s. Adai Mehra Productions,
represented by Mr. & Mrs. Amit
Prakash Mehra, 806, Kings
International House, Juhu Church,
Juhu, Mumbai, 49.

Even in the suit filed in the year January, 2008, the address of the respondent (defendant no.2) is shown as above. It appears that the suit summons were issued to the respondent, through City Civil Court/Small Causes Court at

Mumbai and the suit was posted on 18/01/2011, on which date the summons were not returned. On that day, an application was filed on behalf of the petitioner, to issue fresh summons by registered post A/D, which was allowed. The order sheet dated 25/01/2011 shows that the summons issued through the Small Causes Court, Bombay were returned unserved. On 21/02/2011, the petitioner prayed for service of the respondent through publication, which was allowed and the publication was made in 'Economic Times', where the returnable date was mentioned as 6/04/2011. On that day, none appeared for the respondents and the matter was posted for 27/04/2011, when the respondents were marked ex-parte.

9. In the application for setting aside ex-parte decree, the respondents claimed that their address mentioned in the cause title of the suit was incorrect. They gave the correct

address as under:

30 Sumeet Bungalow,
11th Road, Juhu Ville Parle Scheme,
Mumbai 400 049.

They claimed that they were not aware of the filing of the suit. Thus, the only question is whether the service can be held good and whether the respondents could have been proceeded ex-parte. The petitioner has not brought to my notice any order passed by the Trial Court by which the Trial Court had specifically held the service to be good. The Trial Court had permitted the respondents to be served by publication as per order below Exhibit D-8 which reads thus:

"Considering the fact that the earlier s/s issued to the defendants are returned unserved, the application is allowed. The plaintiff is allowed to serve both the defendants by publication in the local newspaper circulated in the are, where defendants reside."

The Appellate Court has noticed the

provisions of Order 5 Rule 20 of the Civil Procedure Code, to find that only 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 for any other reason, the summons cannot be served, in an ordinary way, the Court shall order the summons to be served by affixing a copy or in any other manner as the Court thinks fit. The Appellate Court has rightly found that there is no such circumstance recorded by the Trial Court while permitting the service by publication. The learned Counsel for the appellant has pointed out that Order 5 Rule 20(1) speaks, not only of a case, where the defendant is keeping out of the way for the purpose of avoiding the service, but it also 'for any other reason', if the summons cannot be served in the ordinary way, the Court can permit such service by affixation or by any other manner, as the Court thinks fit. Even considering the said submission, there is no satisfaction recorded by

the Trial Court that for any other reason the summons cannot be served in an ordinary way. The Appellate Court has found and to my mind rightly so that both in the report of the bailiff as well as the summons issued by the registered post A/D, the report was that the respondents were not available at that address and the report of the postal authority was that the 'addressee had left'. The bailiff report shows that bailiff had gone to the new address at Sumeet Bungalow, 11th Road, Juhu Church, Juhu Mumbai-49, and following is the bailiff's report dated 12/01/2011 :

'I went in search on the Defendant no.1/2 at new address at Sumit bungalow, 11th Rd., Juhu Church, Juhu M'bai-49 on 12/2/11 at about 10.45 am but they were not found on my inquiries with Mr. Shri Nivas Security Guard I was informed that Defendants No.1 & 2 gone out of Mumbai and no fixed date to be returned. Hence I come back.'

Here again, the bailiff report does not show that an attempt was made to affix the summons, if it was found that the respondents had gone

out. Attempt could have been made to issue a fresh notice to serve them at the said address. One thing is clear, on the basis of the report of the bailiff and the postal authorities, that the respondents could not be served on the address as mentioned in the cause title of the plaint and in the bailiff report an alternate address had come on record on which no attempt was made to serve by affixation. In such circumstances, it cannot be said that all other modes available for effecting service were exhausted.

10. Coming to the issue of service by publication, the Trial Court has found that the contention on behalf of the respondents that 'Economic Times' is subscribed only by a section of business class people, would fall flat as the suit agreement is a business agreement. The Appellate Court has found that merely because it was a business agreement cannot mean with

certainty "that the parties subscribe to the Economic Times". It is trite that when it comes to a service by publication, the attempt should be to publish such notice in a newspaper having wide circulation in the area where the party sought to be served either resides or carries on business or works for gain. It is not necessary to go into the question whether 'Economic Times' is or is not a newspaper having wide circulation. The view taken by the Appellate Court (which being a fact finding Court can reappreciate facts) is a plausible view and I see no reason to interfere with the same.

11. The reliance placed on the service of the legal notice on the same address as mentioned in the cause title is misplaced as that was in the year, 2007. That apart, the report of the bailiff and the postal authorities show that the summons/notice could not be served on the same address as mentioned in the cause

title. In my considered view, the reliance placed on the affidavits dated 17/12/2011 and 30/11/2012 would also be of no avail, if we consider the fact that, in the application dated 30/11/2012 in para 2 the respondents have specifically mentioned that their correct address was; '30 Sumeet Bungalow, 11th Road, Juhu Vile Parle Scheme, Mumbai - 400 049'. The report of the bailiff, would also support that.

12. In the case of **Bipin Doshi** (supra), this Court had found that there was no justification for condonation of delay in filing an appeal against the Commissioner of Workmen's compensation. The cause shown there was financial difficulty and that the appellant was 'collecting some information'. It was held that financial difficulty cannot be said to be justifiable reason and the ground that the appellant was 'collecting information', was equally vague.

13. In the case of **P.K. Ramachandra** (supra), there was a delay of 565 days in filing first appeal by the State in challenging an award of the Arbitrator and there was no explanation. It was held that equity cannot be the basis for condoning delay.

14. Coming to the present case, the notice in the Execution Case was stated to be served on the respondents on 11/10/2012. A certified copy was applied for on 17/11/2012 and was collected on 23/11/2012, while the application for setting aside ex-parte decree was filed on 6/12/2012. It appears that an application Exhibit D-8 was filed for condonation of delay on 22/08/2013, which was allowed on 28/08/2014. It cannot be said that there was any gross delay in this case and if the delay is condoned in such case, I see no reason to interfere with the same. I find that the petitioner would get an opportunity to

contest their case before the Trial Court and substantial justice having been done, no case for interference, in exercise of supervisory jurisdiction is made out.

15. The petition is without any merit and is accordingly dismissed with no order as to costs. The parties to appear before the learned Trial Court on 22/08/2016 at 10.00 a.m.

16. At this stage, the learned Counsel for the petitioner requests that the suit may be expedited. The suit is of the year 2010. Considering this, the Trial Court shall decide the same as expeditiously as possible and preferably within a period of one year from the receipt hereof. Parties to cooperate for early disposal of the suit.

C.V. BHADANG, J.

NH