

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (LODGING) No.224 of 2018
in
NOTICE OF MOTION NO.580 OF 2018
in
SUIT NO.2865 OF 1994

Aviation Travels Private Limited Appellant
(Orig.Deft no.1)

vs

Bhavesha Suresh Goradia & ors Respondents
(Respt no.1 is orig. plff and other
Respts are Deft nos.1A to 23)

Mr.V.A.Thorat Sr.Advocate with Mr.T.D.Deshmukh
I.b Mr.Manoj Manohar Badgular for Appellant
Mr.Piyush Raheja with Ms.Tejal Pandya I.b M/s Ashwin Pandya &
Associates for Respondent no.1
Mr.Sanjay Gupta I.b M/s Mishra & Co for
Respondent no.2.

**CORAM : NARESH H.PATIL AND
G.S.KULKARNI, JJ.**

DATED : 09th July 2018

ORAL JUDGMENT (Per G.S.Kulkarni, J)

1. This appeal is directed against an order dated 19.4.2018 passed by the learned Single Judge on notice of motion no.580 of 2018 whereby, the prayer of the appellant/defendant no.1 for setting aside of an ex-parte order dated 7.10.2003 stands dismissed.

2. The appellant is the original defendant no.1 in suit no.2865 of 1994 filed by the respondent no.1/plaintiff. The defendants in the suit

though had appeared but, had not filed a written statement. The Court accordingly, decreed the suit by a judgment and order dated 7.10.2003 in the following terms :

9. “In the circumstances, the suit is decreed as follows :

i) Defendant nos.1 and 1 (a) are ordered and decreed to pay to the Plaintiff and the beneficiaries of the said trust a sum of Rs.77,02,500/- with interest thereon at the rate of 5% per annum from the date of filing of the suit till payment and/or realisation.

(ii) The suit is also decreed in terms of prayers (b) (c) and (g) against defendant nos. 1 and 1 (a).”

3. The appellant/defendant no.1 after about fifteen years i.e. in April 2018 moved the notice of motion in question, before the learned single judge, praying that the ex-parte judgment and decree dated 7.10.2003 passed against the appellant be set aside and the appellant be permitted to file the written statement and defend the suit. An interim prayer was made that pending the disposal of the notice of motion, execution of the decree dated 7.10.2003 be stayed. In the notice of motion, the contention as urged on behalf of the appellant, essentially was that the writ of summons of the suit was never served upon on the appellant at their registered address or any other address where it was carrying on its business. It was urged that Rule 90 of the Bombay High Court (Original Side) Rules, 1980 was not followed and that the appellant had no knowledge of filing of the original suit and thus had no occasion to appear and contest the same. Consequently, the appellant was not aware of the ex-

parte judgment and decree dated 7.10.2003. It was the appellant's case that although in the suit vakalatnama dated 20.7.1994 was filed on behalf of the appellant in the suit by M/s Narayanan and Narayanan, Advocates, it cannot be accepted as valid, as the appellant had not instructed the said Advocates to appear on behalf of the appellant in the suit. It was contended that the vakalatnama was signed by Mr.K.Shrinivas Rao as constituted attorney of the appellant who was never authorized by the appellant to sign vakalatnama on behalf of the appellant. The power of attorney dated 29.4.1993 of the appellant granted to Mr.K.Shrinivas Rao to sign the vakalatnama was also not valid as there was no resolution of the board of directors authorizing grant of a power of attorney. Thus, even the affidavit-in-reply dated 20.7.1994 filed by Mr.K.Shrinivas Rao before the learned single Judge in an earlier notice of motion of the respondent/plaintiff for interim relief, was not valid. M/s Narayanan and Narayanan, Advocates could not have accepted the suit summons on behalf of the appellant. It was contended that though on the day the Court heard the matter and passed the judgment and order dated 7.10.2003, Advocate Mr.N.Raja was shown to have appeared for the appellant and who had informed the Court that he had no further instructions on behalf of the appellant, in such a situation, the Court ought not to have proceeded to pass a decree. This is a clear case that the suit summons was not served on the appellant and for that reason, the ex-parte decree ought to have been set aside.

4. The learned single judge after hearing the parties, dismissed the notice of motion by the impugned order. The learned single Judge did not accept the contention as urged on behalf of the appellant that the suit summons was not served on the appellant. The learned single Judge referring to Rules 51, 79, and 89 of the Bombay High Court (Original Side) Rules 1980 (for short 'the O.S.Rules') held that the suit summons was appropriately served and the learned single Judge had appropriately decreed the suit as per law. It is held that once the defendants had appeared through an Advocate, the Rules permitted service of the writ of summons on the concerned advocate. It is held that the power of attorney by virtue of which vakalatnama was signed by Mr.K.Shrinivas Rao on behalf of the appellant was also never cancelled.

5. In assailing the impugned order, on behalf of the appellant, it is submitted that the learned single Judge ought to have held that the suit summons was not validly served as per the requirement of the O.S.Rules. It is contended that the decision of the Division Bench in *Tardeo Properties Pvt.Ltd vs Bank of Baroda 2007 (5) Bom C.R 557* in which the Court has held that the writ of summons is required to be served was squarely applicable. The learned senior counsel for the appellant has reiterated the submissions as advanced before the learned single Judge and as noted by us above.

6. On the other hand, learned counsel for the respondent-plaintiff has supported the impugned order passed by the learned single Judge. It is submitted that there is no cause for the appellant to contend, that the writ of summons was not served, as the same was properly served as per procedure contemplated by law. It is submitted that the learned single Judge being fully satisfied that the pleas, as urged by the respondent being totally untenable, has rightly rejected the notice of motion.

7. We have heard learned counsel for the parties. We have also perused the record and the impugned order. (We are not persuaded to accept the submissions, as urged on behalf of the appellant.) It is not in dispute that a vakalatnama was filed on behalf of the appellant in the suit by advocates M/s Narayanan and Narayanan. The said advocates had accepted service of the writ of summons. The appellants were also represented by the said advocates at the hearing of the interlocutory proceedings. However, neither the appellant nor the other defendant filed written statement. The appellant was represented also when the learned single judge had taken up the suit for hearing and proceeded to pass the judgment and decree dated 7.10.2003.

8. On this backdrop, the first contention as urged on behalf of the appellant is that the vakalatnama as placed on record of the suit on behalf of the appellant, of M/s Narayanan and Narayanan-Advocates, was

not a valid vakalatnama for the reason that the power of attorney on the basis of which Mr.Srinivas Rao had signed the vakalatnama was itself invalid for want of a board resolution. This submission cannot be accepted as signing a vakalatnama by Mr.Shrinivas Rao for the appellant on the basis of the said power of attorney was a matter completely between the appellant and Mr.Shrinivas Rao the power of attorney holder. There is no material placed on record to indicate that the power of attorney authorizing Mr.K.Shrinivasa Rao to sign the vakalatnama, was at any point of time cancelled by the appellant. The argument therefore, appears to be an after-thought.

9. The next contention as urged on behalf of the appellant that the writ of summons was required to be served on the appellant and not on advocate is also untenable in view of the clear provisions of Rule 50 and 51 of the Bombay High Court (Original Side) Rules, 1980 (for short the “said Rules.”) which reads thus :

R.50. “Address for service-- (i) Every party to a suit shall, on filing an appearance in person or a vakalatnama, file in the office of the Prothonotary and Senior Master a memorandum in writing, giving an address within the local limits of the Court (to be called his “registered” address at which service of any notice, summons or other process may be made on him.”

(ii) Any notice and other process required to be served on any such party shall be deemed to be duly served and the service shall be deemed to be as effectual as if the notice or process had been served on him personally if it is left at his registered address for service or sent to him by registered post at such address. (Emphasis supplied)

(iii) The registered address shall hold good in all proceedings in the suit and in any appeal in such suit and also for a further period of six years from the date of the final decision for all purposes including execution.

(iv) A party who desires to change his registered address shall file a fresh, memorandum in writing giving his new address and such new address shall then be deemed to be the registered address of the party.

(v) Nothing in this rule shall prevent the court from directing the service of the notice or other process in any manner if for any reasons it thinks fit to do so.

(vi) If a party fails to file the registered address as required by sub-rule (i) the court suo motu on the application of any party, reject the plaint, if the party in default is the defendant or make such other order as it thinks fit;

(vii) The provisions of this rule shall, with any necessary modifications apply to parties to any original petition or matter.

R.51. "Acceptance of service by Advocate on behalf of client. When an Advocate has filed his vakalatnama for a party in a suit or matter, he shall accept service on behalf of his client of all processes (including a Chamber Summons, a Notice of Motion and a Summon for Judgment) issued in the suit or matter until he is discharged."

(Emphasis supplied)

10. A plain reading of rule 50 (i) clearly indicates that a party to a suit on filing appearance or a vakalatnama shall file in the office of the Prothonotary and Senior Master, a memorandum in writing, giving the address within the local limits of the Court at which the service of any notice, summons or other process may be made on such a party. Rule 50 (ii) specifies that any notice and other processes required to be served on such a party, shall be deemed to be duly served and service shall be deemed to be effected of the notice/process, as if it had been served on him personally, if it is left at the registered address for service or sent to

him by registered post at such address. Further, as provided in sub-clause (iii) of rule 50 the registered address shall hold good in all proceedings in a suit and also in any appeal in such a suit and also for a further period of six years from the date of the final decision for all purposes including execution. Rule 51 provides that when an advocate has filed his vakalatnama for a party in a suit or a matter, he shall accept service on behalf of his client of all the processes issued in a suit or matter until he is discharged. Thus, once a vakalatnama is filed, the advocate is authorised to receive a writ of summons in a suit on behalf of his client a party to the suit or proceedings. It is thus, not necessary that when a vakalatnama has been filed by an advocate on behalf of a party, the party is nonetheless required to be personally served with the writ of summons in a suit. Such a contention as urged on behalf of the appellant is in the teeth of rule 51 of the said O.S.rules.

11. The reliance on behalf of the appellant on the decision of the Division Bench in *Tardeo Properties Pvt.Ltd* (supra) is not well founded. In the facts of the said case admittedly, the writ of summons was not served either on the defendant or his advocate. The Court observed that the writ of summons, was thus required to be served either on the defendants or his advocate and mere filing of a vakalatnama was not enough.

12. We have also called for the original record of the suit and perused the same. We find that M/s Narayanan and Narayanan placed on record of the suit a vakalatnama duly signed by the constituted attorney of the appellants. The vakalatnama also annexed the power of attorney which was executed by the Chairman and Managing Director Mr.Kudralli Subanna Nagraj of the appellant-company. The power of attorney dated 29.4.1989 is duly executed before the Notary on 29.4.1993 as also the signature of the executant was identified by the advocate. The power of attorney *inter alia* duly authorizes the attorney to accept the writ of summons, notice and other processes issued to the advocate that any court, government or authority whatsoever concerning the suit premises. There are other several clauses in the power of attorney which authorize the constituted attorney to undertake so many other acts in regard to the litigation including a power to compromise, settle disputes. Apart from this, the said record indicates that the advocate for the appellant represented the appellant in the proceedings of the suit on several dates including appearing at inter-locutory application and engaging a senior advocate to argue on behalf of the appellant in the said applications. This is clear from the order dated 26.7.1994 and 2.9.1997 passed in notice of motion No.1847 of 1994.

13. Thus, in our clear opinion, this is a case where the record would clearly indicate that the appellant had appointed an Advocate who

had filed the vakalatnama who as per rules was empowered to receive writ of summons of the suit, which was received by him. Further, the appellant for reasons best known to it was not diligent in filing the written statement though the Advocate for the appellant had appeared from time to time on several occasions. The Court accordingly, decreed the suit as per the clear provisions of Rule 89 and 90 of the said Rules which provide consequence for not filing of a written statement. The said rules read thus :

R. 89: In default of filing appearance or vakalatnama and written statement, suit may be set down on board as undefended.- If the defendant commits default in filing his appearance in person or a vakalatnama and written statement as provided in rule 74, the Judge in Chambers may, when the suit appears on board for directions, direct that the suit be set down on board for disposal as an undefended suit on the same day or on such other day as he may deem fit.

R,90 : Judgment for want of written statement.- Application for judgment for want of written statement shall be made by Notice of motion, but no such notice of motion shall be issued before the date on which the Writ of Summons is returnable. On the filing of an affidavit of service of the Notice of Motion, the suit shall be set down on the daily board for the purpose of such application.”

14. If the above position is an admitted position on facts, then we cannot accept the contention as urged on behalf of the appellant that the judgment and decree dated 7.10.2003 is required to be set aside, as the writ of summons was not personally served on the appellant.

15. Before parting, we may also note as also contended by the learned counsel for the respondent/plaintiff that an attempt was made by another defendant namely defendant no.1A by filing notice of motion

No.1622 of 2010 to set aside the said ex-parte decree. It had failed by a rejection order dated 2.3.2009. An appeal filed against the said order was also dismissed on 4.3.2010. Thereafter, the notice of motion in question, was moved before the learned single Judge which is filed by the appellant after almost about 15 years from passing of the judgment and decree dated 7.10.2003.

16. We are in complete agreement with the well-reasoned order passed by the learned single Judge, that the appellant's notice of motion for setting aside the judgment and decree dated 7.10.2003 was wholly misconceived. So is the appeal. It is accordingly dismissed. No costs.

(G.S.KULKARNI, J)

(NARESH H.PATIL J)