

IN THE HIGH COURT OF BOMBAY AT GOA.

SECOND APPEAL NO. 65 OF 2018.

MILIND G. ARSEKAR
Versus

... Appellant.

JOAO FRANCISCO RODRIGUES
AND 2 ORS.

... Respondents.

Mr. Sudin Usgaonkar, Senior Advocate with Ms. V. Palyekar, Advocate for the appellant.

Ms. Amira Abdul Razaq, Advocate for respondent nos.3(a) and 3(c).

Coram:- PRITHVIRAJ K. CHAVAN, J.

Reserved on:5th July 2019.

Pronounced on:-2nd August 2019.

ORDER

The challenge in this appeal is to an order dated 2.8.2017 passed by the District Judge-I Margao dismissing the Civil Miscellaneous Application No.95/2016 for condonation of delay in filing the application for restoration of the Regular Civil Appeal No.195/2010 and thereby confirming an order dated 30.4.2010 passed by its predecessor dismissing the Regular Civil Appeal no.195/2010 for non-prosecution.

2 A few facts germane for decision of this case are summarised thus:-

 The appellant is original plaintiff and respondent nos.1 and 2 are the defendants. Respondent nos.1 and 2 are the owners in possession of an immovable property known as “PAJIFOND” or PAJIFONDO PRIMEIRO LOTE (WESTERN HALF) registered under description no.45871 recorded at page 142 of Book no.B-119 maintained at the Land Registration Office of Salcete, Goa, equivalent to half of the larger property enrolled in the Taluka Revenue Office of Bardez, Goa under Matriz No.2779, presently surveyed under Chalta No.31 of P.T. Sheet no.217 of the City Survey of Margao, Goa, totally admeasuring an area of about 368 square metres.

3. By an oral agreement dated 15.4.1995, the appellant agreed to buy suit property from the respondent nos.1 and 2 for a consideration of Rs.3,00,000/-(Rupees three lakhs only). The Sale Deed was to be executed upon payment of entire consideration and production of documents necessary for clearance of title. Out of the total amount of consideration, an amount of Rs.2,80,000/-(Rupees two lakhs eight

thousand only) was paid to the respondent nos.1 and 2 in seven instalments. Last instalment was amounting to Rs.30,000/- (Rupees thirty thousand only) which was paid to one M/s. S.M. Constructions as per direction of respondent nos.1 and 2. Seven receipts of different dates came to be issued by the respondent nos.1 and 2 acknowledging the payment.

4. After the seventh instalments was paid to M/s S.M. Constructions, the appellant, as a matter of caution published a public notices in “Herald and Gomantak” dated 31.8.1995 indicating about the agreement between him and the respondent nos.1 and 2 with respect to the suit property in order to avoid creation of any third party right.

5. On 3.5.1997 while visiting the suit property the appellant noticed certain developments and construction work. He, therefore, filed Special Civil Suit No.108/1997/III against the respondents in the Court of IIIrd Addl. Civil Judge, Senior Division, Salcete Margao seeking Specific Performance of oral agreement dated 15.4.1995 to sell the suit property and to execute the registration of Deed of Sale in favour of the

appellant for consideration as agreed upon, *inter alia*, a relief of permanent injunction restraining the respondents from entering into any transaction in respect of the suit property.

6. On 16.10.1997, respondent no.3/original defendant no.3 filed a third party application by stating that it has purchased the suit property from respondent nos.1 and 2 vide Deed of Sale dated 12.08.1996 registered with Sub-Registrar, Salcette, Goa.

7. Consequently, the appellant amended the plaint and prayed for declaring the aforesaid Sale Deed dated 12.8.1996 as null and void and cancellation of the same from the books of Sub Registrar of Salcete, Goa. After pleading were completed, the learned Trial Court by a Judgment and decree dated 30.9.2003 directed the respondent no.1 to refund to the appellant an amount of Rs.2,80,000/- with 15% interest.

8. Aggrieved, the appellant preferred First Appeal bearing no. 222/2004 in the High Court. Pursuant to the Goa Civil Courts (Amendment) Act 2009, First Appeal was remanded to the District Court,

South Goa, Margao for disposal.

9. Upon receipt of the records and proceedings, the said appeal was renumbered as a Regular Civil Appeal no.195/2010 and notices were issued to the parties.

10. The learned District Judge vide order dated 30.4.2010 dismissed Regular Civil Appeal No.195/2010 for non-prosecution based on the bailiff's report dated 18.3.2010 which indicated that the appellant was served by affixation.

11. It is the contention of the appellant that till 7.3.2016 he was unaware of the remand of the appeal due to change in jurisdiction and came to know about the same only after reading the public notice dated 3.3.2016 published in a local daily news paper namely "Herald" dated 6.3.2016. He came to know from said publication that the suit property was proposed to be purchased by one Advocate Noel D'Souza.

12. The appellants thereafter filed an application on 28.3.2016

for restoration of Regular Civil Appeal no.195/2010 under Order 41 Rule 19 of C.P.C. alongwith an application for condonation of delay bearing Civil Miscellaneous Application No.95/2016 under Section 5 of the Indian Limitation Act 1963 for filing such application for restoration.

13. It is contented that the appellant did not receive any notice of appearance in Regular Civil Appeal No.195/2010. Reliance upon the bailiff's report dated 18.3.2010 by District Judge while dismissing the appeal, according to the appellant is fraudulent and mischievous one, as it does not disclose the manner in which the service was effected upon the appellant. The appellant, therefore, has approached this Court and has prayed for setting aside the impugned order dated 2.8.2017 passed by learned District Judge *inter alia* restoration of Regular Civil Appeal No.195/2010.

14. Heard Mr. Sudin Usgaonkar, learned Senior Counsel for the appellant and Ms. Amira Razak, learned Counsel for the respondent nos.3(a) and 3(c).

15. The learned Senior Counsel drew my attention to the copy of the roznama in Regular Civil Appeal No.195/2010 dated 5.3.2010. The roznama reads thus:-

<i>Dated on which the case comes before the Court for proceeding</i>	<i>No. of exhibit</i>	<i>Milind G. Arsekar Appellant V/s Joao Francisco Rodrigues and ors. Respondents</i>	<i>Date on which case is adjourned.</i>
<i>03/03/10</i>		<i>Before Shri U. V. Bakre, Principal District Judge, South Goa, Margao.</i>	
	<i>B-1</i>	<i>Received Records and Proceedings in Appeal from Order No. F.A. No.222/2004. F.A. No.222/04 (1 Misc. File), M.C.A. No.350/2004, M.C.A. No.703/2009 and 4 sets of paper book alongwith R & P in Spl. Civil Suit No.108/1997/III(6 files) from the Hon'ble High Court, at Panaji Bench Goa in view of the Goa Civil Courts (Amendment) Act, 2009. The appeal is re-registered today.</i>	
	<i>B-2</i>	<i>Certified copy of Judgment &</i>	
	<i>B-3</i>	<i>Decree dt.30.09.2003, passed by the Court of IIIrd Addl. Civil Judge, Senior Division at Margao in Spl. Civil Suit No.108/1997/III</i>	
	<i>D-4</i>	<i>Index of Appeal from Appeal</i>	

		<i>from Order No.222/2004.</i>	
		<i>Placed for orders Sd/- Assistant Sheristedar By order of the Court.</i>	

16. Roznama dated 15.3.2010 indicates that the matter was called out before P. V. Sawaikar, District Judge, II South Goa Margao and an order was passed on Exh.1 to issue notice to the appellant and the respondents which were made returnable on 23.3.2010. Roznama further indicates that notices were issued to the appellants as well as respondent nos.1 to 3. Roznama dated 22.3.2010 reveals that as per Exh. 5, the appellant was duly served by affixation on the door. However, he was absent. None present for the appellant. Respondent nos.1 and 2 were duly served by affixation. They were also absent. However, one Advocate Bodke was present on behalf of respondent no.3 and filed vakalatnama. The learned Senior Counsel has drawn my attention to the bailiff's report dated 18.3.2010 which is as follows:-

“This is to certify that I had been at given addresses to serve the notices on appellant and respondent nos.1) and 2). The flat of the appellant found locked then, I inquired with the neighbour's and they identify the said flat. Similarly, the respondent nos. 1) and 2) were not

found by me, at there hence the house found locked. The same house was identified by me, one tailor, his name he was not disclosed also he refused to sign on the original copy(office copy) as a witness.

Than, as per the order of this Hon'ble Court, I affixed both the copies of notices, on the front door of the house of said respondents.”

17. Affidavit of bailiff in respect of service upon the respondents as above is also filed on record. According to the learned Counsel this is not a proper service upon the appellant. The appellant was not at all served properly by the bailiff. It is contended that bailiff's dairy does not indicate that the appellant was duly served.

18. Bailiff had failed in his duty as contemplated in Order 5 Rule 17 of CPC. Bailiff has not mentioned as to which neighbour alleged to have identified the flat of the appellant; in the sense, neither there is name nor there are any details of the so called tailor.

19. On the other hand, the learned Counsel for the respondent nos. 3(a) and 3(c) while countering the arguments of learned Senior Counsel stressed that there was a due service upon the appellant by the

bailiff in support of which the learned Counsel has taken me through the record indicating as to how despite due service, the appellant preferred to remain away leading to dismissal of the appeal.

20. Order 5 Rule 17 of CPC read thus:-

“Procedure when defendant refuses to accept service, or cannot be found:-

Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, [who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time] and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.”

21. As stated hereinabove, the appellant had preferred an appeal

before this Court on 6.5.2004 bearing no.222/2004. This Court pursuant to the Goa Civil Courts(Amendment) Act, 2009 remanded the same to the District Judge which was subsequently renumbered as Regular Civil Appeal No.195/2010. It was dismissed by the District Judge on 3.4.2010 for non-prosecution based on the bailiff's report dated 18.3.2010.

22. It is the contention of the appellant that till 7.3.2016, he was unaware of the remand due to change in jurisdiction. He came to know only on reading public notice dated 3.3.2016 published in the newspaper "Herald" dated 6.3.2016.

23. It would be pertinent to note that the bailiff's report is the crux of the matter. A perusal of the bailiff report dated 18.3.2010 reveals that bailiff had visited the flat of the appellant "T-1", Mahalaxmi Apartments, Comba Margao, Goa. The bailiff noticed that the said flat was locked. He inquired with the neighbours who had identified the said flat. He also inquired with one tailor who refused to disclose his name and refused to sign original copy indicating that bailiff had acted with due diligence. It appears that there is an error in the report in the sense

that bailiff had also mentioned in the report that respondent nos.1 and 2 were not found by him. That error itself would not falsify the authenticity of the bailiff's report in the light of the fact that extract of bailiff's dairy produced on record by the respondents reveals that process was served on the house of the appellant by pasting. Bailiff's diary also indicate even the names of the respondents which can be, at the most, be said to be an inadvertent error. Refusal to tell the name by tailor to the bailiff would not be construed as non-compliance of effecting proper service. It is not the contention of the appellant that there is no tailor in the neighbourhood.

24. Secondly, the appellant himself has substantiated the fact that he is not residing at the registered address in his application under Section 5 of the Limitation Act bearing CMA No.95/2016 in para 21 stating that he shifted his residence from flat no.T-1, Mahalaxmi Apartments, Comba Margao Goa to block no."C", HR-3, Maynard Goa Beach Palace, Near Maria Hall, Mazilwaddo, Benaullim, Salcete, Goa 403716. Obviously, bailiff found the flat of the appellant locked since he was not residing at the registered address. Even if it is the contention of

the appellant that he still visits his old residence which is the registered address, once in a month or once in a fortnight, he ought to have noticed the notice affixed on the door of his flat. It would, therefore, not lie in the mouth of the appellant to say that he did not notice the affixation of the notice on the door of his flat.

25. Order 6 Rule Rule 14-A of CPC reads thus:-

“14A. Address for service of notice.--

- (1) Every pleading, when filed by a party, shall be accompanied by a statement in the prescribed form, signed as provided in rule 14, regarding the address of the party. Parties subsequently added shall immediately on being so added file a memorandum in writing of this nature.*
- (2) Such address may, from time to time, be changed by lodging in Court a form duly filled up and stating the new address of the party and accompanied by a verified petition. Notice of such change shall be given to such other parties as the Court may deem it necessary and the form showing the change maybe served either on the pleaders or such parties or be sent to them by registered post pre-paid for acknowledgment as the Court thinks fit.*
- (3) The address furnished in the statement made sub-rule (1) shall be called the “registered address” of the party, and shall, until duly changed as aforesaid, be deemed to be the address of the party for the purpose of service of all processes in the suit of in any appeal from any decree or order therein made and for the purpose of execution, and shall hold good, subject as*

aforesaid, for a period of six years after the final determination of the cause or matter.

- (4) (i) *Where a party is not found at the registered address and no agent or adult male member of his family, on whom a notice or process can be served is present, a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present, another date shall be fixed and a copy of the notice, summons or other process shall be sent to registered address of that party by registered post pre-paid for acknowledgment (which pre-payment shall be made within one month from the date originally fixed for hearing) and such service shall be deemed to be as effectual as if the notice of process had been personally served.*
- (ii) *Whether a party engages a pleader, notice or process issued against the party shall be served in the manner prescribed by Order III, rule 5, unless the Court directs service at the registered address of the party.*
- (5) *Where the registered address of a party is not filed within the specified time or is discovered by the Court to be incomplete, false or fictitious, the Court may, either on its own motion, or on the application of any party, order-*
 - (a) *in case where where the default in furnishing registered address is by the plaintiff or where such registered address was furnished by a plaintiff, rejection of the plaint, or*
 - (b) *in case where the default in furnishing registered address is by the defendant or where such registered address was furnished by a defendant, his defence is struck out and he be placed in the same position as if he had not put any defence."*

26. It was incumbent upon the appellant to furnish his new

address in view of the mandate of Order 6 Rule 14-A in which the appellant has failed. He, therefore, cannot raise this grievance subsequently. The appellant was not prevented from giving fresh address, rather no sufficient cause has been shown by the appellant which has prevented him from furnishing his fresh address. Bailiff of the Court, therefore, cannot be blamed for the alleged improper service.

27. Order 5 Rule 17 of CPC provides procedure when the defendant refuses to accept service, or cannot be found. The bailiff in this case used all due and reasonable diligence but could not find the appellant at his registered address. Since, the appellant had changed his address, there was no likelihood of he being found at the residence within reasonable time. There was no one empowered by the appellant to accept the service on his behalf. The bailiff has, therefore, rightly affixed copy of the summons on the outer door of the flat.

28. Paragraphs 607 to 621 of the Civil Manual prescribes the duties of bailiff and supervision over them. Paragraph 618 of the Manual reads thus:

“No bailiff charged with service of a process is entitled to call upon the party interested in the service to point out the person to be served.

It is the duty of the bailiff to use his best efforts to effect the service and, it is only when he fails, in spite of such efforts, that the Court may order the party to render help to him.

Where the serving officer does not know the individual on whom the process is to be served, but such individual is pointed out to him, the person who points out the individual served should be asked to make an endorsement on the process.”

In view of paragraph 618 of the Civil Manual, the bailiff herein used his best efforts to effect the service.

29. Indisputably, the appellant had preferred a First Appeal before this Court bearing No.222/2004 after dismissal of Civil Suit on 30.9.2003 by the IIIrd Additional Civil Judge, Senior Division, Margao. It would be far-fetched to say that the appellant did not pursue the appeal in the High Court which came to be remanded to the District Court. No sane man will believe such conduct of the appellant.

30. It is quite surprising to note that after filing an appeal in the High Court in the year 2004, the appellant did not inquire about its fate

for a long period of 12 years with his Advocate, this conduct and attitude of the appellant is writ large. It smacks malafide.

31. The learned Counsel for the respondent nos.3(a) and 3(c) has drawn my attention to the observations made by the learned District Judge in the impugned order dated 2.8.2017 in paragraphs 43, 44, 46 and 47. The respondents have objected development permission dated 28.1.2014 for construction of compound wall in the suit property. An affidavit of one Shekhar Waman Panandikar, who is Civil Engineer was tendered before the District Judge whose services were engaged by the respondents for drawing the plan of the compound wall to be constructed. The Engineer was getting the wall constructed through a mason namely Ramu. Construction of the compound wall commenced in the month of March 2014. Mr. Ramu received a call from the appellant who was obstructing the construction of the compound wall. When the respondents visited the site he informed the appellant about the dismissal of the appeal four years before by the District Court, Margao. This also speaks about the knowledge of the appellant. The appellant, therefore, cannot be permitted to raise a false plea of ignorance. He is estopped

from doing so.

32. A corollary of the aforesaid discussions would result in dismissal of the appeal, as I do not find any substantial question of law involved in it.

33. As such, appeal stands dismissed with no order as to costs.

PRITHVIRAJ K. CHAVAN, J.

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