

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 92 OF 2020****DR. SITARAM @ NITISH DEVDATT
KERKAR****... Petitioner****Versus****MESSRS DESSAI REAL ESTATES
DEVELOPERS, REP. BY ITS PARTNER,
SANTOBARAO KRISHNARAO DESAI AND 12
ORS.****... Respondents**

Adv. Ashwin D. Bhobe for the Petitioner.

Adv. Nigel John Fernandes for Respondent no.1.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 13th March 2020.

Oral Order:

In Special Civil Suit No.6/2019, before the Civil Judge, Senior Division, at Ponda, the first respondent is the plaintiff. He sued the defendants, that is the petitioner and others for specific performance. He, in fact, contracted with the petitioner and others; but the Deed was signed by the petitioner. He signed both in his individual capacity and also as the Power of Attorney agent of the other defendants. Legally speaking, the deed was signed by all concerned; but physically seen, it bears the petitioner's signature alone.

2. So, to enforce that contract, the plaintiff showed in the suit all the other defendants as represented by the petitioner, who is the second defendant. Accordingly, he took out the suit summons to the petitioner, showing the petitioner as the second defendant and also the GP Agent of

others. But, when the petitioner received it, he entered appearance and objected to the mode of service of the summons on him. According to him, though he is an agent, about the course of litigation he has no specific instructions from the other defendants, who live at various other places. He, therefore, contends that the plaintiff must first serve the summonses on all the defendants in their individual names; if they instruct the petitioner to represent them, he would be willing to be their agent.

3. To this effect, he has filed an application before the trial Court. The plaintiff opposed it, however. Eventually, on 4th January 2020 the trial Court passed an order, holding that the service of the summons on the petitioner is good service because he represents the other defendants: the defendant nos.1 and 3 to 7.

4. Aggrieved the petitioner has filed this writ petition.

5. Heard Shri Bhobe, the learned counsel for the petitioner; and Shri Fernandes, the learned counsel for the respondents.

6. Indeed, the plaintiff contracted with the defendants. That deed of agreement the second defendant signed for himself and for others. Undeniably, the second defendant acted as the other defendants' agent, and that agency still subsists. To have that contract enforced, the plaintiff filed the suit. As the agency has still been subsisting, he took out the summons and served it on the petitioner—justifiably so. Now, the second defendant does not want to represent the other defendants.

7. In this context, we may, to begin with, refer to Order III. Rule 1 of this Order accepts any appearance, application, or act in or to any Court by party in person, or by his recognized agent, or by a pleader appearing, applying or acting on his behalf. But if the court insist, the party alone should act. Rule 2 defines who a recognised agent is. The recognised agent of a party to the litigation is the person holding a power-of-attorney, authorising him in this regard or a persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorised to make and do such appearances, applications and acts.

8. That said, Sections 27 to 29 and Order V CPC deal with the summonses, to the parties and to the witnesses. Section 27 requires the court to serve summons on the defendant “to appear and answer the claim.” The summons “may be served in manner prescribed on such day not beyond thirty days from date of the institution of the suit.” And that manner of serving summons is set out under Order V of CPC. Rules 1 and 2 set out the essentials of the summons. Rule 3 requires, if necessary, the parties in person, and Sections 132, 133 and Rule 4 of Order V deal with exemption from appearance in person. In the same vein, Rules 5 to 8 of Order V describe the contents of the summons and Rule 9 to 30, the mode of service.

9. Examined deeper, Rules 10 to 16 and 18 of Order V provide for the personal or direct service of the summons, and Rule 9 deals with service by the court. On the other hand, Rule 9-A permits the plaintiff to serve the summons on the defendant, in addition to service by the court. And Rules 17, 19, and 20 deal with substituted service. Finally, Rules 21 to 30 of Order V deal with the service of summons in special cases. At any rate, a defendant's refusal to accept the summons amounts to deemed service. The objections about the service of summons, however, must be raised at the earliest possible opportunity, lest the objection should be deemed to have been waived.

10. Let us elaborate on these provisions to the extent relevant. Order V, as we have already noted, deals with how the suit summons should be served. Rule 1 (1) of that Order mandates that when the suit has been duly instituted, "a summons may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any, within thirty days from the date of service of summons on that defendant. Under sub-rule (2), a defendant to whom a summons has been issued under sub-rule (1) may appear (a) in person, or (b) by a pleader duly instructed and able to answer all material questions relating to the suit, or (c) by a pleader accompanied by some person able to answer all such questions.

11. In fact, Rule 9 of Order V assumes importance for our purpose: On whom should the summons be served? That provision, dealing with the delivery of summons, declares that the summons could be served on the

defendant residing within the jurisdiction of the Court, or on his agent residing within that jurisdiction and “empowered to accept the service of the summons.” The service of summons may be by delivering a copy 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, and so on.

12. Rule 12 of Order V requires “wherever it is practicable, service shall be made on the defendant in person.” But this mandate has an exception; if that defendant has an agent “empowered to accept service,” personal service on the defendant is not *sine qua non*.

13. Here, the second defendant, that is the petitioner, insists that the suit summons must have been first served on the other defendants, and only on their instructions would he act as their agent in the suit. In this context, the respondents' counsel draws my attention to Order V, Rule 12 of C.P.C. As we have already noted, Order V Rule 9 prescribes the method as to how the suit summons must be delivered. On the other hand, Rule 12 declares that whenever it is practicable, the summons shall be served on the defendants in person, unless he has an agent empowered to accept service. In this case, the defendants 1 and 3 to 7 have the agent—the second defendant. He lives within the jurisdiction of the trial Court. And his GPA has been subsisting.

14. First, thus, we should accept that the suit summonses have been duly served on all the defendants once they have been served on their

recognised agent. Nevertheless, a contract is terminable; so is an agency. Either the principal or the agent can terminate a contract subject to certain contingencies and conditions.

15. *Chitty On Contracts*¹ holds that by the express revocation of the agency by the principal; or “by renunciation of the agency on the part of the agent himself,” the agency can be determined. According to the learned author, such revocation or renunciation is effective notwithstanding that the agency was created by deed or for consideration, and may be oral even though the appointment was by deed. But though it terminates the authority it does so without prejudice to any right that either party may have against the other to damages under a contract ; and as between the parties a repudiatory breach of contract, at any rate by the principal, is, in accordance with general rules, inoperative until accepted.

16. A power of attorney, Chitty states, is a formal authority to one person to act in the place of another, and the donor of such a power is liable to third parties for any acts of the donee within the scope of the power. A power of attorney must be created by deed. According to him, it is given usually in situations of illness or absence, though sometimes for commercial purposes, too.

17. In another celebrated commentary, *Law of Contract*, under Chapter 15. Privity of Contract Under the Law of Agency”, speaking of termination of agency, M P Furmson et al., state that “agency is determinable either by act of the parties or by operation of law. It is

¹Prof. Hugh Beale, 32nd Ed., Sweet & Maxwell, 2015, Vol.II, 31-166, 167

determined by act of the parties if there is a mutual agreement to that effect, or if the authority of the agent is renounced by him or revoked by the principal.” Determination by operation of law occurs by the happening of some event which renders the agency unlawful and also by the death, insanity or bankruptcy of one of the parties. The learned authors also hold that “any unilateral termination of the relationship by either party will be wrongful unless it is in accordance with the contract.”²

18. In fact, any person including an agent, for valid reasons, raise objections on the service of summons. Here, the second defendant does not want to act as an agent of his principals. In this context, the plaintiff contends that the second defendant is admittedly the other defendants' Power of Attorney holder and that Power of Attorney still subsists; so he squarely answers the legislative mandates under Order 5 Rule 12 of C.P.C.

19. We may accept that law does not compel him to act against his wish; after all a contract is consensual. And his action amounts to renunciation of agency—renunciation before a court of law, at that. As to renunciation, can the agent approbate and reprobate? The second defendant argues that the suit summonses must be, first, served on the other defendants—his principals. Then, they may instruct him to act on their behalf. But through the GPA, the principals have already done that. The second defendant has not argued that the GPA does not clothe him with the power to represent his principals in the suit. It is, undeniably, a

²Cheshire, Fifoot and Furmston's Law of Contract (16th Ed.) 2012, p.593

comprehensive delegation, which permits, rather requires, the second defendant to represent his principals in legal proceedings, too.

20. Innocuous as the dispute appears, I reckon the issue of agency assumes importance under Order III and Order V of CPC. It should not be a devious or dilatory device in the hands of unscrupulent litigants. First, no party can buy time or drag the proceedings by insisting that the summonses should be served on the principals despite the subsisting agency in his favour. But once the principal revokes the agency or the agent renounces it, neither should be allowed to confine that revocation or renunciation only to the suit. It has public purpose to serve. Any third party can deal with the agent based on the subsisting agency. If the principal and the agent are allowed to apply their agency selectively—that is, their acting under the agency under certain circumstances and their repudiating under certain other circumstances—that leads to confusion. No third party can be sure when and how the principal and agent are going to act under the agency. Of all the powers delegated, an agency either subsists or stands terminated; it cannot be transaction specific.

21. Here, the Court told the second respondent that he could no longer act as the agent of the defendants 1 and 2 to 7 even if they ask him to represent them. For he has renounced the agency. The second respondent, through his counsel, informs the Court that “in this suit” he will act for himself but will not represent the other defendants. According to him, the beyond this suit, the GPA remains undisturbed. Does it? Let us see.

22. We have already seen the statutory position. If we apply those provisions to the facts here, these things emerge: (a) The second defendant is a registered agent of the defendants 1 and 3 to 7; (b) the agency had been subsisting when the suit summons was served on the second defendant; (c) service of summons on the agent is good service; (d) So all the defendants are deemed to have been properly served; and (e) the second defendant's insistence, after his receiving the summons for the other defendants as their agent, amounts to his renouncing the agency post the service of summons.

23. In the above circumstances, what are the options available for the parties to the suit:

(a) For the second respondent:

- (i) Until he informed the trial Court that he did not want to represent the other defendants, he acted as their registered agent under the GPA;
- (ii) As a result, the service of summonses on him for the other defendants was due service.
- (iii) His application to the trial Court amounts to his renouncing his agency under the GPA, subject to other contractual and statutory consequences, though.
- (iv) Having renounced the agency after receiving the summonses, that renouncement does not affect the due service of the summonses.
- (v) But having renounced the agency, the second defendant could inform the trial Court that he would no longer represent the other defendants—his erstwhile principals.
- (vi) That said, this informing the trial Court cannot be unilateral.

(vii) The second defendant must communicate to the other defendants—his principals—about his renunciation and require them to represent themselves in the suit.

(viii) The second defendant should file the proof serving the notice (under point vii) on the other defendants. Or

(ix) He may withdraw his application from the trial Court's file and continue to be the other defendants' agent.

(b) The plaintiff:

If the other defendants do not represent themselves in the suit after their receiving the notice from the second defendant or after having knowledge about the second defendant's renouncing the agency, he should pay the process fee to enable the registry to service the summonses on the other defendants, once again.

(c) The defendants 1 and 3 to 7:

Informed by the second defendant about his renouncing the agency, should enter appearance in the suit on their own if they choose to contest the case.

To the extent indicated above, the impugned order, dated 4th January 2020, stands modified. The writ petition is accordingly disposed of. No order on costs.

DAMA SESHADRI NAIDU, J.

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