

IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBA No.24 of 2022
(Through Hybrid mode)

Odyssa Home and Commercial Pvt. Appellant
Ltd.

Mr. Tanmay Mishra, Advocate

-versus-

Kashinath Mitra Respondent

Mr. Milan Kanungo, Senior Advocate

CORAM: JUSTICE ARINDAM SINHA

ORDER
20.07.2022

Order No.

01. 1. Mr. Mishra, learned advocate appears on behalf of appellant and submits, the appeal has been preferred against judgment dated 25th March, 2022 made by the Court below in directing interim measure on the petition made under section 9, Arbitration and Conciliation Act, 1996, ex parte against his client. He draws attention to order-sheet and in it orders dated 28th September, 2021 and 25th October, 2021. He submits, when the Court had found that notice issued against his client had been returned for want of correct address, thereafter, the Court committed error on 25th October, 2021 in directing there be substituted service, following which finding in impugned judgment, in effect that his client had chosen not to appear. Thus, the judgment rendered ex parte against his client is liable to be set aside in appeal.

2. Mr. Kanungo, learned senior advocate appears on behalf of respondent and submits, though first agreement dated 25th April, 2014 does give premises number of appellant as N3/B6 but subsequently by supplementary agreement dated 14th February, 2017, appellant itself said its office is at premises number N3/86. He draws attention to notice dated 10th August, 2020 issued by his client to appellant at premises number N3/86. Said notice stood received. There is also supplementary agreement-II dated 16th January, 2019, where premises number of appellant has been said to be N3/86. All the agreements were signed on every page by appellant. This is just a ploy to deal with his client's property on having committed breach of the development agreement. There should be no interference but direction for the parties to proceed to get adjudication in reference to arbitration.

3. Mr. Mishra in reply refers to letter dated 19th July, 2019 addressed by respondent to his client at premises number 93/B6. He submits, this was the last communication made before respondent moved Court under section 9. As such, it is clear that respondent, to avoid his client getting notice of the petition, addressed it to premises N3/86.

4. Paragraph 3 from impugned judgment is extracted and reproduced below.

“3. Be it mentioned here that despite sufficiency of service of notice through paper publication, i.e. substituted service, neither the O.P. appeared through his counsel nor participated in person in this proceeding. On the

date of hearing, despite repeated calls, the O.P. did not appear”

Mention in impugned judgment is sufficiency of service necessarily requires reference to, inter alia, orders dated 28th September, 2021 and 25th October, 2021, relied upon by appellant. The two orders are reproduced below.

“Order dt.28.09.2021

Learned counsel for the petitioner files a memo along with postal receipt and tracking report. Notice issued as against O.P. is back without service for want of correct address. Notice issued through Regd. Post is back with a report “left”. Accommodation sought for by the local bar. Put up on 25.10.21 for filing of fresh step as against O.P.

*Sd/- R.S. Hota
District Judge, (K) at BBSR.*

★ Order dt.25.10.2021: ★

Learned counsel for the petitioner files a petition U/o.5 Rule-20 CPC supported by an affidavit praying to serve the notice to the O.P. by paper publication as per the ground stated therein. Accommodation sought for by the local bar. P.O. is on C.L. Put up on 13.12.21 for consideration of petition filed today.

*Sd/- S. Dubey
District Judge, (K) at BBSR I/C”*

5. Court notices that principal agreement states premises number of appellant to be N3/B6 but following supplementary agreements give the premises number as N3/86. While appellant had executed the supplementary agreements, respondent had addressed last letter dated 19th July, 2019 to

appellant at premises number N3/B6. The two premises numbers used by both parties are deceptively similar. There being a mistake cannot be ruled out.

6. It will appear from order dated 28th September, 2021 that the Court below said, notice issued against appellant was back without service for want of correct address. The Court went on to say, notice issued through registered post is back with a report 'left'. These two findings contradict each other. A postal article may be returned to sender because it could not be served for want of correct address. However, a postal article returned to sender with endorsement 'left' means that the addressee left the address without intimation. The latter is good service. However, direction in order dated 28th September, 2021 was for filing fresh step as against appellant.

7. By order dated 25th October, 2021, it appears, there was direction for putting up application under order V rule 20 in Code of Civil Procedure for substituted service on next date and thereafter there was direction for it. Substituted service could only have been pursuant to direction for fresh step on finding in earlier order dated 28th September, 2021 that notice issued against appellant is back without service for want of correct address. This is because, as aforesaid, the next finding in said order is that postal article is back with report 'left', which was good service and did not warrant substituted service. This gives rise to the question as to whether there can be substituted service, when the finding is that the postal article was returned without service for want of correct address. The provision in order V rule 20 does not stand

satisfied on said finding in order dated 28th September, 2021. Respondent's application for substituted service ought not to have been allowed. Instead, there should have been direction for service to correct address.

8. In view of aforesaid what emerges is that appellant was not heard in the Court below, in the making of impugned judgment. It was made under section 9 in the Act of 1996, without proper notice to appellant. As such it is set aside in appeal and the case remanded to the Court below for rehearing and order.

9. Parties or any of them may forthwith inform the Court below of this order and seek early hearing on remand. The Court below will set down a date for hearing of the petition and will try to dispose of it within six weeks from date. This is because respondent's contention has already been heard. It is only appellant, who will have opportunity to meet the contentions and for respondent to make submissions in reply.

10. The direction for status quo by impugned judgment, is directed as made in this appeal, to subsist till disposal of the case on remand.

11. The appeal is disposed of.

(Arindam Sinha)
Judge