
(1995) 01 GUJ CK 0041
In the Gujarat High Court

Bhogilal Girdharlal

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 20-01-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 20, Order 5 Rule 20

Citation : (1996) 2 GLR 142

Hon'ble Judges : M.R. Calla, J

Bench : Single Bench

Judgement

M.R. Calla, J.—This appeal u/s 104 read with Order 43 of the Code of Civil Procedure, has been filed against the order dated 31st March 1983, whereby the application moved for setting aside the ex parte decree was dismissed.

2. Special Civil Suit No. 44 of 1974 was filed by the State of Gujarat in the Court of learned Civil Judge (S.D.) at Godhra for a sum of Rs. 1,20,778/- against the present appellant and the appellant Nos. 2 to 7 arrayed as respondents in the present appeal. According to learned Counsel for the appellant, the aforesaid suit was filed on 17th December 1974.

3. In the first instance, the summons which were issued to the defendants could not be served because the address of the defendants as was given by the plaintiff was not complete and proper. Later on, the summons were sent by Registered Post Acknowledgment Due, but these summons sent by Registered Post Acknowledgement Due were returned as served or unserved or not, could not be ascertained and the plaintiff, i.e., the State of Gujarat applied for substituted service by publishing the summons in the newspaper and an order was passed on 5-8-1975 as given out by learned Counsel for the appellant, ordering for the substituted service. The trial Court ordered for the substituted service by publishing the summons in "Jai-Hind" newspaper. Thereafter, the service was treated to be sufficient and on 30th December 1975, the suit was decreed against the defendants for a sum of Rs. 1,20,778/-. It is the case of the present appellant that when the decree was sent for execution in Rajkot Court,

the notice was served upon the present appellant on 24th September 1978 and only then, he came to know that in the aforesaid suit, an ex parte decree has been passed against him. Thereafter, on 13th October 1978, the application was moved for setting aside the ex parte decree and this application for setting aside the ex parte decree was dismissed on 31-3-1983. It is against this order dated 31-3-1983, passed in Civil Misc. Application No. 94 of 1978, by the learned Civil Judge (S.D.) at Godhra that the present appeal has been filed.

4. Learned Counsel for the appellant has submitted that the plaintiff had not given the proper address in the first instance, and therefore, the summons could not be served; but it is an admitted fact that the plaintiff had then applied for service of the summons by Registered Post and thereupon the application was made for substituted service by publishing in the newspaper and the same was published in "Jai-Hind" newspaper and this substituted service by publishing in the said newspaper was considered to be sufficient service and the ex parte decree was passed.

5. The argument of learned Counsel for the appellant is that the order of the substituted service passed in this case was not in conformity with the requirements of Order 5 Rule 20 of the Code of Civil Procedure, inasmuch as it was the fault of the plaintiff that the proper address could not be given in the first instance and the trial Court had not verified as to whether the summons which were sent by Registered Post had been returned served or unserved and there was no material to form the opinion that the defendants were keeping out of way for the purpose of avoiding the service and hence the order passed by the Court for substituted service was not in conformity with Order 5 Rule 20 of the Code of Civil Procedure. Had the factum of filing of the suit be known to the appellant, he would have certainly taken steps to appear before the Court to contest the claim and would not have allowed the ex parte decree to be passed and, therefore, the trial Court has wrongly rejected the application of the appellant for setting aside the ex parte decree. It is also said that the area which is mentioned in the summons is an area spread into two to four kilometres in the city of Rajkot and, therefore, the view could not be taken that the service was avoided and the impugned order dated 31st March 1983 deserves to be set aside.

6. I have heard learned Counsel for the appellant, Mr. A.G. Uraizee, learned A.G.P. on behalf of the opponent No. 1, i.e., the plaintiff in the suit. I have also gone through the impugned order dated 31st March 1983. The learned Civil Judge (S.D.) at Godhra has passed a detailed order after considering the cases which were cited before him and has come to the conclusion that the order of substituted service had been rightly passed and on that basis, the service was rightly found to be sufficient in terms of Order 5 Rule 20 of the CPC and therefore, the ex parte decree could not be set aside and accordingly, the application has been rejected. There is no doubt that, initially, the address given by the plaintiff in the suit for service upon the defendants was not proper and complete, and, therefore, the summons were unserved, but later on, with the

leave of the Court, the summons were sent by Registered Post Ack. Due. It appears from the impugned order that the fact with regard to the service of these summons sent by Registered Post or otherwise could not be verified and, therefore, the plaintiff in the suit applied for substituted service under Order 5 Rule 20 of the Code of Civil Procedure. Order 5 Rule 20 is reproduced as under:

Order 5 Rule 20:

(1) 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 that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

(1A) Where the Court acting under Sub-rule (1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.

Effect of substituted service - (2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

Where service substituted, time for appearance to be fixed - (3) Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

7. Sub-Rule (1 A) was inserted in Amendment of 1976 and whereas the order with regard to the substituted service in the instant case was passed on 5-8-1975, for the purpose of deciding the controversy, reference is only to those provisions of Order 5 Rule 20 which were in existence prior to the Amendment of 1976. According to Order 5 Rule 20(1), if the Court has reason to believe that the defendant is keeping out of way for the purpose of avoiding the service, or that for any other reasons the summons cannot be served in the ordinary way, the Court may order that the summons be served by affixing the copies thereof as narrated in Order 5 Rule 20(1) or in such other manner as the Court thinks fit.

8. In the facts of the case at hand, the present appellant had stated in the cross-examination that the office of his firm, namely, M/s. Praveen Construction Co. was situated at 6, Jayraj Plot. He has also admitted that the firm had entered into contract with P.W.D. and the address for correspondence was given as 6, Jayraj Plot. He has also admitted that all the correspondence and letters exchanged between this firm and P.W.D. were on the above address, i.e., Jayraj Plot. It has also been admitted in the cross-examination that, 6 Jayraj Plot was the house of one of the partners of the firm who was also arrayed as a defendant in the suit and in the very same premises, the office of M/s. Praveen Construction Co., was situated. In fact, one of the partners was residing at this

address and the summons were served upon the defendant No. 5 in the said suit at the very same address. It has also been admitted that "Jay-Hind" is one of the prominent newspapers of Saurashtra and in the year 1974-75, 25,000 to 30,000 copies of the said paper were circulated. Thus, the publication of the summons was in a local daily having wide circulation in the Saurashtra. May be that, there was yet another paper having wide circulation, namely, "Phoolchhab", but that by itself, does not militate against the order by which the service was taken to be sufficient on the basis of the publication in the newspaper "Jay-Hind". More particularly, when it is absolutely clear that the address and particulars of the appellant herein and other defendants as was mentioned in the summons was the address where they were known to have last resided and carried on their business and personally worked for gain which is the pre-requisite for passing the appropriate order under Order 5 Rule 20 of Code of Civil Procedure. It may be that M/s. Praveen Construction Co., as such may have been closed in the year 1969-70 as argued by learned Counsel for the appellant, but the fact remains that this was the address where the appellant and the defendants were known to have last resided and carried on business. The firm doing business in the name and style of M/s. Praveen Construction Co. may have closed in 1969-70, but the closure of the business of this firm did not wipe off the address where they had last resided or carried on the business or personally worked for gain and it is a fact borne out from the record that one of the partners received the notice of the application which had been moved by the present appellant in which subsequently stayed at this very address, who has been arrayed as an opponent. At page 16 of the certified copy of the impugned order, it has been recorded by the Court as under:

The said summons was served on the defendant No. 5 of the said suit, who is opponent No. 5 in this application, on 5-4-1979. So, the summons was served on the partner of the said firm.

9. In the light of these admitted facts and keeping in view the provisions of Order 5 Rule 20 of the Code of Civil Procedure, the Court while passing the impugned order dated 31st March 1983, has rightly, come to the conclusion that the service effected by substituted service was sufficient. In the facts of this case, when the service could not be effected despite the fact that the summons had been served by Registered Post, so much so, that it was not even clear as to whether the summons had been served or unserved or the State of Gujarat, i.e., the plaintiff had applied for substituted service coupled with the fact that the address of the defendants was given where they appear to have last resided and taking notice of the fact that at this very address the summons had been served upon the defendant No. 5 subsequently, who was one of the partners when the question came up with regard to the application moved by the appellant himself for setting aside the ex parte decree. If the trial Court came to the conclusion that the defendants were keeping out of the way for the purpose of avoiding the service or that in the fact-situation, the summons could not be served in the ordinary way, and the substituted service of publication in the newspaper had

been ordered by the Court in conformity with the provisions of Order 5 Rule 20 of Code of Civil Procedure, there is no basis to interfere with such an order passed with due regard to all the ingredients of Order 5 Rule 20 of Code of Civil Procedure. No party can close his eyes and then complain that he is not able to see. Here is a case in which the circulation of" the newspaper in which the summons were published, and even the wide circulation of this paper in the whole of Saurashtra is not disputed. The appellant cannot be heard saying that he was not subscribing to this particular newspaper and he was reading some other paper, namely, "Phoolchhab". There may be more than one daily newspapers and even if the summons had been published in the newspaper, which has wide circulation and when the publication was under order of the Court, the service cannot be said to be insufficient merely because the complaining party reads some other newspaper. Even in the present appeal, the appellant has given out his address as 1/10 Panchnath Plot and it appears from the impugned judgment that "Jayraj Plot" and "Panchnath Plot" were mentioned as the address of the defendants and the only grievance which has been raised by the appellant is that "Jayraj Plot" and "Panchnath Plot" are very big areas. Looking to the totality of the facts leading to the passing of the order of the substituted service and for the reasons given in the impugned order dated 31 st March 1983, I am of the firm opinion that the appellant's application for setting aside the ex parte decree has been rightly rejected by the impugned order and there is no basis to interfere with the impugned order dated 31st March 1983.

10. Accordingly, this appeal fails and the case is hereby dismissed. The interim relief granted earlier shall stand automatically vacated. There shall be no order as to costs.