
(2015) 09 BOM CK 0069
In the Bombay High Court
Case No : Writ Petition No. 201 of 2015

Malini Murlidhar Nair and Others

APPELLANT

Vs

Rajan Handa and Others

RESPONDENT

Date of Decision : 02-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 17, Order 6 Rule 14A (8), Order 6 Rule 14A(8)

Citation : (2015) 6 ALLMR 397

Hon'ble Judges : C.V. Bhadang, J

Bench : Single Bench

Advocate : Raunaq Rao, for the Appellant; Shivan Desai, Advocates for the Respondent

Final Decision : Allowed

Judgement

C.V. Bhadang, J—Rule. Rule made returnable forthwith. Mr. Desai, the learned counsel for the respondent no.1 waives service. Heard finally by consent.

2. The brief facts are that, the first respondent has filed a suit being Special Civil Suit No. 26/2011 for specific performance of a MOU against the petitioners, (defendants no.1 and 2) and the respondent no.3 (defendant no.3). The petitioners were issued with the suit summons. The bailiff report dated 10/6/2011 in respect thereof reads as under:

"This is to certify that I had visited at Piedade Divar to serve this summons to Def No. 1, 2 and 3 I met the def no.1,2 and 3 and I explained the contents of the summons to them in Konkani but they refused to accept the summons also they did not permit me to affix the summons on the main door of the house as required O.5. R.17 of the C.P.C.

The def no.4 Mt. Michael Sequeira serve through wife Re at Porgovaddo Piedade Divar and I handed over the duplicate copy of the summon along with all annexure to her and obtained her signature.

Affidavit

I, Shri Santosh Naik Bailiff of Civil & Criminal Court is hereby solemnly affirmed on oath that the contents of my report dated 10/6/11 is true to my personal knowledge. Nothing is false and nothing is concealed.

BEFORE ME (sign) 16/6/2011 Head Clerk

3. It appears that on the basis of the said bailiff report, the learned Trial Court had proceeded ex parte against the petitioner and the respondent no.3. It is undisputed that the first respondent has examined himself in the suit.

4. It further appears that the petitioners filed an application for setting aside the ex parte order. That application was filed on 6/12/2012. According to the petitioners, on 29/11/2012, the petitioner no.2 (defendant no.2) had attended the Trial Court in connection with hearing of matrimonial case no.39/12/B filed by his wife. It is contended that while glancing through the daily boards, he came across the board dated 8/11/2012 about the filing of the suit by the first respondent. Thereafter on legal advice, he filed the application for setting aside ex parte order. According to the petitioners, at no point of time the bailiff of the Court had visited their residence and there was no occasion for them to have refused the summons, as reflected in the report of the bailiff. In short it was contended that it was for the first time on 29/11/2012 that the petitioners became aware of the filing of the suit against them.

5. The application was opposed on behalf of the first respondent on the ground that the application is filed eight months after the passing of the ex parte order and that the bailiff report clearly established that the service was refused, which would amounts to a deemed service.

6. Before the learned Trial Court, reliance was placed on behalf of the petitioners on the decision of Andhra Pradesh High Court in the case of K. Panchakshara Reddy Vs. N. Krishna Reddy, AIR 1969 AP 67 , in order to submit that Order 5 Rule 17 requires the process server to affix the copy of the summons in the manner prescribed in Order 5 Rule 17 of C.P.C. thereof, which has not been done in this case. The learned Trial Court after referring to the decision of this Court in M.R. Ved and Co. Vs. S.B. Hayeem, AIR 1943 Bom 340 : (1943) 45 BOMLR 695 , wherein it was held that where a copy of the summons was given to the defendant, who ran away with it, thus rendering it impossible for the serving officer to affix the copy on the residential premises, it would not be expected of the bailiff to affix the same as required by Rule 17 Order 5 of Civil Procedure Code.

7. The learned Trial Court relying upon the bailiff report, found that it amounted to good service. The learned Trial Court has also disbelieved the case of the petitioners that they learnt about the filing of the suit on 29.11.2012, as in the opinion of the learned Trial Court, the copies of the boards of the previous day are kept in office and not in the Court and thus, it was unlikely for the petitioner

to have learnt about the filing of the suit on glancing through the previous boards. In the face of such finding, the application came to be rejected, which is the subject matter of challenge in this petition.

8. I have heard Mr. Rao, the learned counsel appearing for the petitioner and Mr. Desai, the learned counsel appearing for contesting respondent no.1.

9. It is submitted by Mr. Rao, the learned counsel appearing for the petitioner that Order 6 Rule 14A(8) of C.P.C (Bombay amendment), would require that where the party is not found at the registered address, apart from the copy of the summons being affixed to the outer door of the house, the summons has also to be sent by registered prepaid post. It is submitted that on account of non-compliance with the provisions of Order 6 Rule 14A (8) of C.P.C., the service cannot be said to be good service. The learned counsel would also submit that the Trial Court could not have disbelieved the case of the petitioner that they came to know about the filing of the suit only on 29/11/2012. He submits that the petitioners would abide by any condition that would be imposed by this Court while setting aside the ex parte order.

10. On the contrary it is submitted by Mr. Desai, the learned counsel appearing for the first respondent that the provisions of Order 6 Rule 14A (8) would not be attracted in this case, in as much as the said rule envisages a situation where the party is not found at the registered address. It is submitted that in the present case, as per the bailiff's report, the petitioners were personally found at the address and had refused to accept the summons. It is submitted that thus the provisions of Order 6 Rule 14A (8) cannot be called into aid.

11. It is submitted that the bailiff has given his report on affidavit and there is no reason to disbelieve the same. It is also submitted that it is unlikely and improbable that the petitioner would come to know about the filing of the suit while glancing through the previous boards, when the petitioner no.2 had allegedly attended the Court, in connection with the matrimonial petition. It is submitted that the Trial Court has rightly disbelieved the said case. In the alternative it is submitted that appropriate orders may be passed in the matter. It is submitted that in the event this Court is inclined to allow the petitioners to contest the suit, it may be subject to appropriate costs.

12. I have given my anxious consideration to the rival circumstances and the submissions made. At the outset, it needs to be stated that the provisions of Order 6 Rule 14A (8) of Civil Procedure Code envisage a situation where the party is not found at the registered address. That is not the case obtaining in the present matter. There is a bailiff report on affidavit which says that the petitioners were found present and had refused to accept service. The bailiff report also says that the petitioners did not permit the affixation of the summons on the main door, as per the requirement of Order 5 Rule 17 of C.P.C. Thus in my considered view no reliance could be placed on Order 6 Rule 14A (8) of C.P.C.

13. However, in view of the alternate submission made by the learned counsel for

the first respondent, I find that it would be appropriate that the petitioners are afforded an opportunity to contest the suit. It is trite that ordinarily law would prefer a decree on contest than on technicality. In the present case, the petitioners had approached the Court before disposal of the suit. Ordinarily, had they intended to evade the process, they would not have approached the Court with a request for setting aside the ex parte order. In the overall circumstances and in view of the alternate submission made on behalf of the first respondent, I find that indulgence can be granted subject to costs of Rs. 10,000/-, to be paid to the first respondent.

14. In the result, the following order is passed:

- (i) The petition is allowed. The impugned order dated 3/2/2015 and the ex parte order dated 16/2/2012 are hereby quashed and set aside to the extent of the petitioners subject to payment of costs of Rs. 10,000/- (Rupees ten thousand only) to the first respondent.
- (ii) The parties to appear before the Trial Court on 6/10/2015.
- (iii) The costs to be paid on or before 6/10/2015.
- (iv) Rule is made absolute in the aforesaid terms, with no order as to costs.