



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 29TH DAY OF NOVEMBER, 2024

BEFORE

THE HON'BLE MR JUSTICE H.P.SANDESH

MISCELLANEOUS FIRST APPEAL NO. 7207 OF 2024 (CPC)

BETWEEN:

SHRI K. RAJA
AGED ABOUT 63 YEARS,
S/O. LATE KRISHNASWAMY NAIDU,
R/AT NO.32/1, MOORE ROAD,
III CROSS, FRASER TOWN,
BANGALORE - 560 005

...APPELLANT

(BY SRI. ABHISHEK HUDDAR, ADVOCATE)

AND:

V. PRABHAKAR
AGED ABOUT 64 YEARS,
S/O. LATE VENKATESHULU NAIDU,
OCCUPATION: CL-9 LICENSE BUSINESS,
R/AT NO.17/1, 1ST FLOOR,
1ST CROSS, AGA ABBAS ALI ROAD,
HALASURU ROAD,
BANGALORE - 560 042

...RESPONDENT

(BY SMT. UDITA RAMESH AND SRI. ABHISHEK SINGH, ADVOCATES)

THIS MFA IS FILED UNDER ORDER 43 RULE 1(d) of CPC TO SET ASIDE THE ORDER DATED 28.08.2024 PASSED IN MISC.NO.25012/2022 ON THE FILE OF THE XXVI ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, MAYO HALL, BENGALURU CCH-20, BY ALLOWING THE PRESENT APPEAL AND RESTORE THE O.S.NO.25432/2015 ON THE FILE OF THE HON'BLE XXVI ADDL.CITY CIVIL AND SESSIONS JUDGE, BENGALURU (MAYO HALL UNIT) (CH-20) THEREBY PERMITTING THE APPELLANT TO





CONTEST THE SUIT ON MERITS BY PROVIDING AN OPPORTUNITY, ETC..

THIS APPEAL, COMING ON FOR ADMISSION, THIS DAY, JUDGMENT WAS DELIVERED THEREIN AS UNDER:

CORAM: HON'BLE MR JUSTICE H.P.SANDESH

ORAL JUDGMENT

Heard learned counsel for appellant and also learned counsel appearing for respondent.

2. This Miscellaneous First Appeal is filed against the order passed in Misc.No.25012/2022 rejecting the petition filed under Order 9 Rule 13 r/w Section 151 of C.P.C with cost of Rs.1,000/-.

3. The factual matrix of the case before the trial Court is that when the suit is filed for relief of the judgment and decree on the ground that defendant is liable to pay a sum of Rs.8,80,000/- and hence Court has issued summons against the appellant herein and the same was returned at the first instance 'unserved' and in the second instance when the notice was ordered through RPAD, it was returned with an endorsement 'defendant is not in station' and thereafter an application is filed



invoking under Order V Rule 20 of C.P.C, seeking paper publication against the appellant herein and the same was allowed and he was placed ex-parte. The trial Court proceeded to record the evidence and passed the judgment and decree. Being aggrieved by the impugned judgment and decree, Misc.Petition is filed invoking Order 9 Rule 13 r/w Section 151 of C.P.C, wherein the ground that was urged is when the suit summons was ordered to him had been returned unserved and respondent by contending that petitioner was intentionally avoiding service of notice filed an application under Order V Rule 20 of C.P.C and taken notice through paper publication vide order dated 26.03.2017. Based on the same, Court proceeded to place him ex-parte. The main contention also urged before the Miscellaneous Court was that once the notice was returned with an endorsement he was not in station, at least he would have taken the notice by way of affixture and the same was not taken and proceeded to file an application under Order V Rule 20 of C.P.C. No proper



service was made on the appellant and hence, called for interference of the Court.

4. The said Misc.Petition was resisted by the respondent herein by filing statement of objections contending that notice was issued and he avoided service of notice and hence, paper publication was taken under Order V Rule 20 of C.P.C and cannot found fault with the procedure adopted in placing him ex-parte. The trial Court having considered the grounds urged in Misc. Petition raised the following point for consideration:

"Whether the petition filed by the petitioner under Order 9 Rule 13 of CPC deserves to be allowed?"

5. The trial Court thereafter allowed the parties to lead evidence and petitioner examined himself as PW-1 and respondent is examined as RW-1 and petitioner got marked certified copies of judgment and decree in O.S.No.25432/2015. On the other hand respondent produced certified copy of the Misc.Petition



No.25012/2022 and also certified copy of order sheet along with plaint in O.S.No.25432/2015.

6. The trial Court having considered the grounds which have been urged in the petition and also material placed on record comes to the conclusion that when the notice was issued, postman visited three times and he was not present on those days, hence the same was returned as 'party out of station' and taking into note Ex.P3 to 8 in O.S.No.25432/2015, initially Court has issued suit summons to the defendant and thereafter through RPAD, which was returned with shara "he is out of station" and hence invoked Order V Rule 20 and same was allowed and it was a proper service against the respondent and comes to the conclusion that Execution petition was also filed, wherein he has been served with same address and when such being the case, no ground is made out to allow the Misc.Petition.

7. The trial Court has also taken note of the contention of the petitioner herein that since he has



pressed into service the Order V Rule 20 of C.P.C and considering the same comes to the conclusion that plaintiff has not taken steps for service of suit summons through affixture, but it was issued through Court and also through RPAD and defendant cannot be found fault and hence, Court satisfying with the reasons order has been passed. The trial Court also comes to the conclusion that Order V Rule 20 of C.P.C is a directory procedure and not mandatory procedure and hence, not accepted the case of the petitioner and dismissed the petition and hence, the present Miscellaneous First Appeal is filed before this Court.

8. The main contention of the counsel appearing for the petitioner before this Court is that mandatory requirement of Order V Rule 17 of C.P.C has not been complied with instead invoked Order V Rule 20 of C.P.C and has erred in founding that suit summons was served on appellant and the very approach of the trial Court is erroneous. The learned counsel also vehemently contend



that Order V Rule 17 of C.P.C is very clear that if the defendant is not in the house, at least would have affixed the same on the conspicuous place of the defendant, where he resides and no such attempt is made to affix the same. Learned counsel would submit that no application is filed before the trial Court seeking affixture of the notice and the suit summons issued to the appellant was returned unserved in the first instance on 13.12.2016 and also when the same was returned, in the second instance on 09.02.2017 and also particularly the address of the appellant mentioned in Original suit and Execution petition is one and same and when such being the case when he was not in station, ought to have taken steps invoking the Order V Rule 17 of C.P.C and no such efforts was made.

9. *Per contra* learned counsel appearing for respondent would contend that when notice was not served at the first instance and the same was returned with an endorsement 'unserved' and second time when it was sent through RPAD, the same was returned with an



endorsement 'out of station'. Hence, Order V Rule 20 was invoked and the Court on satisfaction of the grounds which have been urged since he evaded the service of summons, filed an application and the order was passed for paper publication and hence, he was placed ex-parte and the Court cannot find part with any error on the plaintiff in taking steps and in following the procedure.

10. The learned counsel also in support of his arguments relied upon judgment in ***Mahadevamma and others Vs. Bhagya***¹, wherein also, in case notice was served by affixture on the board, without the judicial order having been passed in that regard order was challenged and Court having considered that there was no any order, comes to the conclusion that placing the defendant ex-parte is clearly unsustainable and allowed the appeal and counsel referring to this judgment would vehemently contend that in the absence of any judicial order, bailiff cannot affix the notice on the conspicuous place where the

¹ 2018 SCC Online KAR 4537



defendant resides and in the case on hand, the said contention that under Order V Rule 17 has not been complied with cannot be accepted.

11. In reply to the arguments of the learned counsel for respondent, counsel appearing for appellant would vehemently contend that the notice was not served on the appellant, the trial Court ought not to have allowed the application without compliance of Order V Rule 17 and hence, the order requires interference by this Court.

12. Having heard the learned counsel for appellant and also learned counsel appearing for respondent and also the principles laid down in the judgment relied by learned counsel for respondent, the points that would arise for consideration of this Court is:

- (i) *Whether the Miscellaneous Court committed an error in not accepting the reasons assigned by the appellant regarding non compliance of Order V Rule 17 of C.P.C and committed an error in dismissing the petition file under Order 9 Rule 13 of C.P.C?*



- (ii) *Whether it requires interference by this Court?*
- (iii) *What order?*

REASONS

13. This Court would also like to mention Order V Rule 20, which reads as under:

20. Substituted service- (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]

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



(3) Where service substituted, time for appearance to be fixed - 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."

14. Having considered the material on record, admittedly notice issued was not served and thereafter notice was taken through RPAD and same was also unserved and endorsement was issued 'he was not in station' when the visit was made by the postman and thereafter an application was filed under Order V Rule 20 of C.P.C and the same was allowed and thereafter he was placed ex-parte. This Court would like to refer the very proviso of Order V Rule 17, since appellant's main contention is Order V Rule 17 is very clear that when defendant refused to accept service or cannot be found, where the serving Officer, after using all due and reasonable diligence, cannot find the defendant 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 therein 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. The learned counsel would vehemently contend that procedure is very clear that it ought to have been affixed as per the provisions of Order V Rule 17 of C.P.C.

15. Having read the proviso of Order V Rule 20 of C.P.C., it is very clear that when the Court is satisfied that, there is reason to believe that 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.

16. The further provision is that 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 and this amendment was brought in the year 1976, which came to be effected on 01.02.1977.

17. Having read the proviso to Order V Rule 17 as well as Order V Rule 20, the Court has to read both the provisions of Order V Rule 17 and Order V Rule 20 conjointly. The learned counsel also relied upon Division Bench Judgment in ***Nova Granites (India) Ltd Vs.***



Coach Kraft (Bangalore) Pvt. Ltd². This judgment is relied on before the trial Court while addressing the arguments in Miscellaneous Proceedings and this Court in the above judgment has extracted Order V Rule 17 of C.P.C and held that on a careful perusal of the aforesaid provision would go to show that if the serving officer finds that the person who is required to be served refuses the summons and notice or not found, he shall affix a copy of the same on the outer door or some other conspicuous part of the house in which such 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. The provisions of Order V Rule 17 of C.P.C will have to be

² *ILR 1994 KAR 52*



strictly construed. The propositions cannot be stretched to the extent of holding that one should be hyper technical in considering Order V Rule 17 of C.P.C. If on a careful perusal of the return, verified by the process server sworn to before the authority competent to administer oath, on information one can say that all the contentions are complied with, but would be wrong to say that service is bad simply returning that it is not exactly in the form prescribed affixed in Code of Civil Procedure and same is discussed in paragraph Nos.15 and 19 of the judgment.

18. Having read conjointly the provisions under Order V Rule 17 as well as Order V Rule 20 and sub-clause (1), it is very clear that substituted service by way of affixture as well as paper publication, in view of amendment to sub-clause (1A) of Order V Rule 20 of C.P.C and before proceeding to the same, Order V Rule 17 is also to be taken note of, but in the case on hand it is not the case of refusal, but he was not present at the time when the postman went to make service on the



appellant/defendant. When he was not in station and no such information was also given and nothing is mentioned that an intimation was delivered and when such being the case and when no such intimation is given, question of it has come to the notice of appellant/defendant does not arise. Without any notice, he was placed ex-parte and invoked Order V Rule 20 of C.P.C. The respondent ought to have taken once again steps when the same was returned with an endorsement 'he was not in station' and there was no any intimation or information with regard to the initiation of the suit and did not comply with Order V Rule 17 of C.P.C or either affixed the same on the conspicuous place of the defendant where he resides or sought for any permission of the Court to take substituted service by way of affixture and no such affixture was also made and only an application was filed by respondent/plaintiff before the trial Court or notice was ordered for paper publication and when such being the case, the trial Court fails to take note of the very judgment which was relied upon by the appellant before the trial



Court comes to the conclusion that postman went to the house on 24.12.2016, 26.12.2016 and 27.12.2016, he was absent on those days and there is no endorsement that he has intimated even any other adult member of the family, but only endorsement was made 'party out of station' and the same has been accepted by the trial Court while rejecting the petition filed under Order 9 Rule 13 and hence, the trial Court committed an error and though mentioned the above cited judgment in paragraph No.17 which has been relied upon by the appellant before the trial Court, comes to the conclusion that it was only a directory procedure and not mandatory procedure and not accepted the contention of the appellant.

19. The proviso of Order V Rule 17 of C.P.C. is very clear that when the serving officer cannot find the defendant 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. But the wordings used 'shall' and when the word used is 'shall' the very reasoning given by the trial Court that it is directory not mandatory is a wrong notion of the trial Court and had lost sight of the very proviso of Order V Rule 17 and committed an error in coming to the conclusion that it was only a directory and hence, the very contention of the appellant that not complied with mandatory provisions of Order V Rule 17 of C.P.C, there is a true. The very contention of the respondent that the proviso of Order V Rule 20 is very clear with regard to amendment is concerned and to take the notice and purposefully he avoided service of notice



and hence, Order V Rule 20 of C.P.C is pressed into service cannot be accepted and hence it requires interference by this Court and the trial Court committed an error in dismissing the petition filed under Order 9 Rule 13 r/w Section 151 of C.P.C and hence, I answer the above points in affirmative.

20. In view of the discussions made above, I pass the following:

ORDER

- (i) Appeal is hereby allowed.
- (ii) The impugned judgment and decree is set aside.
- (iii) The parties are directed to appear before the trial Court on 20.12.2024 without expecting any notice.
- (iv) However, it is made clear that the suit is of the year 2015 and the same was disposed of in the year 2018 and hence the appellant is given liberty to file written statement on the date of appearance i.e., on 20.12.2024 itself.



- (v) The trial Court is directed to dispose of the matter within a period of four months.
- (vi) The parties and their respective counsels are directed to assist the trial Court in disposal of the same within a stipulated period.

SD/-
(H.P.SANDESH)
JUDGE

RR
List No.: 1 SI No.: 46