



GAHC010244662019

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP/143/2019

M/S. ASHMAN INFRA PROJECT PVT. LTD. AND ANR.
REP. BY ITS DIRECTOR SRI MINTU NATH HAVING ITS REGISTERED
OFFICE AT LOKNATH PATH, LALGANESH, P.O. ODALBAKRA, GUWAHATI-
781034, DIST. KAMRUP (M), ASSAM

2: MINTU NATH
S/O LT. NALINI KANTA NATH
LOKNATH PATH
LALGANESH
ODALBAKRA
GUWAHATI-781034
DIST. KAMRUP (M)
ASSA

VERSUS

BIPRANGSHU TALUKDAR
S/O SRI BENI MADHAB TALUKDAR, R/O FLAT NO. D-2, 6TH FLOOR
BLOCK-B, SHANTI NIWAS, NATUNPARA, MISSION ROAD, P.O
BONGAIGAON, DIST. BONGAIGAON, ASSAM-783380

Advocate for the Petitioner : MR. K K NANDI

Advocate for the Respondent : MRS. A CHAKRABORTY



**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

ORDER

Date : 01.03.2021

Heard Mr. K.K. Nandi, learned counsel for the petitioners and Ms. A. Chakraborty, learned counsel for the respondent.

2) The legality of the order dated 17.09.2019, passed by the learned Civil Judge, Bongaigaon in T.S. No. 76/2018, thereby rejecting petition no. 1517/19 under Order IX Rule 7 read with Section 151 CPC, and refusing to set aside order dated 29.04.2019 to proceed *ex parte* against the petitioners is in challenge in this application filed under Article 227 of the Constitution of India.

3) Referring to the documents annexed to this application, the learned counsel for the petitioners has submitted that the manner in which order was passed to proceed *ex parte* against the petitioners is not sustainable.

4) Per contra, the learned counsel for the respondent has referred to the statements made in the petition no. 1517/19 filed by the petitioners under Order IX Rule 7 read with Section 151 CPC, it is submitted that the petitioner no.2 had clearly admitted that the address given in the summons was their address, as such, no infirmity or jurisdictional error was committed by the learned trial Court by rejecting the said petition.

5) At the outset, it would be relevant to refer to the date-wise orders passed by the learned trial Court. By order dated 12.10.2018, the suit filed by the respondent was registered and direction was issued by the learned trial Court to the respondent to take steps, fixing the next date on 22.11.2018. On 22.11.2018, the Court took note of the service report on the petitioners- defendants in the connected misc. case and directed the respondent to

provide proper and correct address of the petitioners and the next date of the suit was fixed on 21.12.2018 for address of the petitioners. However, it appears that the case records were put up before the learned trial Court on 19.12.2018 and on the said date, the respondent was allowed to serve summons on the petitioners in a substituted manner and the respondent was directed to take steps in terms of Rule 20A of Order V of CPC. While retaining the date of 21.12.2018, the suit was fixed on 24.01.2019 for service report. As per order dated 21.12.2018 and 24.01.2019, the learned Judge was on transfer and that by filing petition no. 112/19 dated 24.01.2019, the respondent took time for taking steps and the next date of the suit was fixed on 26.02.2019 for passing necessary orders. As per order dated 26.02.2019, the learned trial Court directed the respondent to serve summons in a substituted manner and the next date of the suit was fixed on 30.03.2019. As per order dated 30.03.2019, the respondent produced a copy of local vernacular daily dated 12.03.2019, where the summons was published. However, the learned trial Court did not accept it as duly served because the address of the petitioners was at Guwahati, whereas the newspaper was of Bongaigaon edition. Therefore, the respondent was directed to make an endeavour to produce the Guwahati edition of the said newspaper, fixing 29.04.2019 for production of newspaper. As per order dated 29.04.2019, Guwahati edition of newspaper published on 12.03.2019 was produced before the learned trial Court. By referring to the provisions of Order V Rule 9 CPC read with Section 27 of the General Clauses Act, the learned trial Court deemed due service of summons on the petitioners and ordered the suit to proceed *ex parte* against the petitioners and the next date of the suit was fixed on 29.05.2019. On 29.05.2019, the respondent had submitted his evidence- on- affidavit as PW-1 and the next date was fixed on 19.06.2019 for *ex parte* argument. On 19.06.2019, the petitioners had appeared and filed the said petition no. 1517/2019 to vacate the order to proceed *ex parte* against them. Moreover, the learned counsel for the respondent is right in pointing out that in the said petition no. 1517/19 dated 19.06.2019, the petitioner no.2 had admitted that the address given in the cause title was their address. To overcome this admission, the learned counsel for the petitioners has submitted that the agreement for sale dated 27.03.2017 between the parties contained previous address of the petitioners, which had changed and the new address was incorporated in two money receipts dated 12.07.2017 and 22.01.2018 and it is submitted that the address for service of summons was incorrect.

6) Having perused the materials on record, the Court is of the considered opinion that the manner in which service of summons was affected on the petitioners, the order to proceed *ex parte* against the petitioners was not proper. Firstly, it is evident from the order-sheet of the learned trial Court on record that the learned trial Court by order dated 22.11.2018, had directed the respondent to provide proper and correct address of the petitioners. In this regard, it would be appropriate to refer to the provisions of Order VI Rule 14A CPC, which is extracted herein below:-

14A. Address for service of notice.- (1) Every pleading, when filed by a party, shall be accompanied by a statement in the prescribed form, signed as provided in rule 14, regarding the address of the party.

(2) Such address may, from time to time, be changed by lodging in Court a form duly filled up and stating the new address of the party and accompanied by a verified petition.

(3) The address furnished in the statement made sub-rule (1) shall be called the "registered address" of the party, and shall, until duly changed as aforesaid, be deemed to be the address of the party for the purpose of service of all processes in the suit or in any appeal from any decree or order therein made and for the purpose of execution, and shall hold good, subject as aforesaid, for a period of two years after the final determination of the cause or matter.

(4) Service of any process may be effected upon a party at his registered address in all respects as though such party resided thereat.

(5) Where the registered address of a party is discovered by the court to be incomplete, false or fictitious, the Court may, either on its own motion, or on the application of any party, order—

(a) in the case where such registered address was furnished by a plaintiff, stay of the suit, or

(b) in the case where such registered address was furnished by a defendant, his defence be struck out and he be placed in the same position as if he had not put up any defence.

(6) Where a suit is stayed or a defence is struck out under sub-rule (5), the plaintiff or, as the case may be, the defendant may, after furnishing his true address, apply to the Court for an order to set aside the order of stay or, as the case may be, the order striking out the defence.

(7) the Court, if satisfied that the party was prevented by any sufficient cause from filing the true address at the proper time, shall set aside the order of stay or order striking out the defence, on such term as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit or defence, as the case may be.

(8) Nothing in this rule shall prevent the Court from directing the service of a process at any other address, if, for any reason, it thinks fit to do so.

7) For the purpose of serving summons on the Petitioner No. 1 Company, the Code provides in Order XXIX Rule 2 as follows:-

2. Service on corporation.- *Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served—*

- (a) on the secretary, or on any director, or other principal officer of the corporation, or*
- (b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business.*

8) On a conjoint reading of the provisions of Order VI, Rule 14A and Order XXIX, Rule 2 CPC, it would appear that to effect service of summons on Company, the learned trial Court is required to ensure that Rule 2 of Order XXIX of the CPC is adhered to. Moreover, the learned trial Court by order dated 22.11.2018, had directed the respondent to provide proper and correct address of the petitioners, as such, without recording its satisfaction that the address of the petitioners in the cause title of the suit as well as that given as "registered address" of the parties was correct, it was not open to the learned trial Court to order substituted service of summons.

9) The Court had requested the Court Master to search for the registered address of the petitioner no.1 and in course of search in the internet, it has transpired that the registered address of the petitioner no.1, as per portal of Ministry of Corporate Affairs was not the one which is mentioned in the cause title of the plaint or address given in the summons served in the substituted manner. The learned counsel for the respondent could not show any document from where it would appear that the address in which substituted summons was served was the registered address of the Petitioner no.1 Company as required under Rule 2 of Order XXIX of CPC.

10) The learned trial Court appeared to have acted in a great haste. By order dated 22.11.2018, while the learned trial Court was fully aware that no summons was issued on the petitioners, yet, it took cognizance of service report on the petitioners in the connected misc. case. No reason is assigned for such action. Moreover, it is noted that on 22.11.2018, the learned trial Court did not arrive at a conclusion that the petitioners were avoiding service and thus, the next date of the suit was fixed on 21.12.2018 for disclosure of address of the petitioners. Thereafter, the suit was taken up on an off date, i.e. on 19.12.2018, even when there was no urgency whatsoever and order was passed to serve the summons in a substituted manner. In this regard, it would be appropriate to refer to the provisions of Rule 20 of Order V of the CPC, which is as follows:-

*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 had 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.

11) In order dated 19.12.2018, the learned trial Court did not record its satisfaction that there is reason to believe that the defendants i.e. the petitioners herein are 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, which is the essential pre-conditions to order substituted service of summons under Rule 20 of Order V of CPC. As indicated herein before,

notwithstanding the power of the Court under Sub-Rule 1 of Rule 20 of Order V of CPC that if the Court is satisfied that for "*any other reason the summons cannot be served in the ordinary way*", it can order substituted service. But under the scheme of CPC, there appears to be no provision from which the Court would derive power to undo the order dated 22.11.2018 by which direction was issued to the respondent to provide proper address, and proceed to take cognizance of service report returned in Misc. Case and to pass order to issue summons to be served in a substituted manner without even once issuing summons. Thus, the only conclusion that can be drawn in this case is that the learned trial Court had acted in undue haste in ordering and accepting service of summons in a substituted manner.

12) It is apparent from the impugned order dated 17.09.2019 that the learned trial Court did not record its satisfaction that the report of the process server in misc. case was in accordance with law, meaning thereby that Rules 11 to 19 of Order V of CPC and the provisions of Rule 63 to 65 of the Civil Court Rules and Orders of Gauhati High Court was complied with by the process server while serving notice in misc. case. Apparently, the service was not done in a proper manner because in the newspaper publication of summons, the summons contains reference to TS No. 76/18 and Misc. (J) 68/18. The requirement to scrupulously comply with the relevant provisions of the CPC and Civil Court Rules and Orders of Gauhati High Court has been held to be mandatory by this Court in the case of *Sushil Kumar Saha Vs. Juran Chandra Saha, (1992) 2 GLR 455: AIR 1993 Gau 48*. There can be no apparent reason for the learned trial Court to not consider Rule 64(1) of the Civil Court Rules and Orders (Vol-I) and Note-3 of Form No. (P) 1-A of Civil Court Rules and Orders of Gauhati High Court (Vol-II).

13) Incidentally, it may be reiterated that in petition no. 1517/19 under Order IX Rule 7 read with Section 151 CPC, it was mentioned in para-8 that the defendant was carrying his business in the address depicted in the cause title and that no registered letter containing summons was received. In this regard, it is seen that although there is an admission that the petitioners had their office in the address given in the cause title of the

plaint, but it was admittedly not the registered address of the petitioner no.1, as such, by conduct of the parties, the legal requirement under Rule 2 of Order XXIX of CPC still remained not complied with.

14) We may also refer to that part of the impugned order dated 17.09.2019, wherein the learned trial Court had posed a question to itself as follows – *"According to him, the address given in this cause title of the plaint is correct and he used to receive any postal correspondence at the said given address. If it is so, then why, the postal department had returned back the registered letter addressed to the defendant with some endorsement which is not legible, is not known."* The said part of the order appears to expose three points. Firstly, that the postal peon was not examined by the learned Court to know the reason postal envelope was returned and secondly, the postal remark was illegible, as such, the Court obviously does not know what was the nature of endorsement, and thirdly, how could the learned trial Court expect that the petitioners would have an answer as to how and why the postal department had returned the registered envelope.

15) Therefore, in view of the detailed discussions made herein before, the Court is inclined to hold that in the facts of the present case, the learned trial Court had (i) failed to exercise its jurisdiction to issue summons to the petitioners in the suit, (ii) exercised power and jurisdiction with material irregularity to order substituted service of summons without recording satisfaction as required under Order V, Rule 20(1) CPC, (iii) exercised power and jurisdiction illegally and with material irregularity to direct substituted service of summons without recalling its order 22.11.2018, by which the respondent was directed to provide proper and correct address of the petitioners- defendants, (iv) exercised jurisdiction with material irregularity by taking up the suit on an off-date on 19.12.2018, when the suit was otherwise fixed two days later, i.e. on 21.12.2018, without there being any urgency and ordered substituted service of summons and thereby acted with undue haste, (v) exercised jurisdiction with material irregularity by ignoring the fact that notwithstanding non- issuance of summons in the suit, satisfaction was not recorded to the effect that the notice in Misc. (J)

Case No. 68/2018 was served in accordance with law, and proceeded to issue order for substituted service of summons (vi) exercised jurisdiction illegally and with material irregularity by omitting to take notice of the requirement of Order XXIX, Rule 2 CPC when serving notice on the Company, because such legal requirement did not get obliterated by conduct of the petitioner no.1 to carry on business from an address which was not its registered address. Moreover, all these factors including adherence to the Rules 11 to 19 of Order V of CPC and the provisions of Rule 63 to 65 of the Civil Court Rules and Orders of Gauhati High Court by the process server while serving notice in misc. case were overlooked while passing the order impugned herein. Therefore, the impugned order is not sustainable on facts and in law and the impugned order dated 17.09.2019, passed by the learned Civil Judge, Bongaigaon in T.S. No. 76/2018, is set aside.

16) However, taking note of the fact that the petitioner no.2, who was admittedly carrying on business from the address given in the plaint does not get the benefit of the provisions of Order XXIX, Rule 2 CPC, not being a Company. Therefore, it appears that this is a fit and proper case wherein the respondent be compensated with money for (i) the delay in disposal of his suit, (ii) counsel fees incurring in conducting the suit, (ii) counsel fees for contesting this application, (iv) cost for newspaper publication of summons. Accordingly, it appears that ends of justice would be met if cost of Rs.40,000/- (Rupees Forty thousand only) is imposed on the petitioners as a pre-condition for permitting them to contest the suit. Accordingly, it is provided that subject to pre-condition that the petitioners deposit the cost of Rs.40,000/- before the learned trial Court on the date herein after fixed for appearance, the learned Civil Judge, Bongaigaon shall accept the written statement filed by the petitioners. Accordingly, subject to payment of cost, the impugned order dated 17.09.2019, passed by the learned Civil Judge, Bongaigaon in T.S. No. 76/2018, thereby rejecting petition no. 1517/19 under Order IX Rule 7 read with Section 151 CPC, and refusing to set aside order dated 29.04.2019 to proceed *ex parte* against the petitioners is set aside. Resultantly, petition no. 1517/19 stands allowed.



17) The parties herein are hereby directed to appear before the learned trial Court on 29.03.2021 without any further notice of appearance and if the said date be a holiday, then on next working date. On such date, the petitioners shall deposit the cost of Rs.40,000/- before the learned trial Court and seek further instructions from the said learned Court. On such deposit being made, the learned trial Court shall accept the written statement of the petitioners and also disburse the said cost to the respondent herein on being identified by his counsel.

18) Needless to mention that as deposit of cost is made as a pre-condition, the opportunity to contest the suit by acceptance of written statement shall stand lapsed and revoked because of default.

19) This application stands allowed with cost to the extent as indicated above.

JUDGE

Comparing Assistant