

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****SECOND APPEAL NO. 171 OF 2005  
With  
CIVIL APPLICATION NO.7589 OF 2005****For Approval and Signature:****HONOURABLE MR.JUSTICE R.S.GARG**

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1 Whether Reporters of Local Papers may be allowed  
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy  
of the judgment ?

4 Whether this case involves a substantial question  
of law as to the interpretation of the  
Constitution of India, 1950 or any order made  
thereunder ?

5 Whether it is to be circulated to the Civil  
Judge?

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**PATEL BABUBHAI BUTABHAI - Appellant(s)****Versus****KOLI KHODABHAI MANGALBHAI & ANR. - Respondent(s)**

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**Appearance :**

SHRI KETAN A. DAVE for Appellant(s).  
SHRI D.A. SURANI for Respondent(s) : 1.  
RULE SERVED for Respondent(s) : 2.

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**CORAM : HONOURABLE MR.JUSTICE R.S.GARG****Date : 30/11/2006****ORAL JUDGMENT**

1. The appeal has been admitted for hearing the  
parties vide Order dated 11<sup>th</sup> September, 2006 on the

following substantial questions of law:

- “(1) Whether, on the facts and in the circumstances of the case, the plaintiff was legally served of the summons issued in Regular Civil Suit No.42 of 1993 and the said Court was entitled to proceed *ex parte* against the present plaintiff/defendant of the said case?
- (2) Whether, on the facts and in the circumstances of the case, the two Courts below were justified in observing that though the summons were not served in accordance with the directions of the Court, but, there would be a presumption of valid service?”

2. The short facts leading to the present appeal are that Koli Khodabhai Mangalbhai had filed Civil Suit No.42 of 1993 against the present appellant, Patel Babubhai Butabhai. The learned trial Court in the said suit, after holding that the defendant (present plaintiff-appellant) was duly served, proceeded *ex parte* and ultimately, granted decree in favour of the present respondent – Koli Khodabhai Mangalbhai.

2.1 The present plaintiff-appellant, Patel Babubhai Butabhai, filed Civil Suit No.95 of 1998 in the Court of

the learned Civil Judge (J.D.), Gadhada, seeking a declaration that the decree passed in original Civil Suit No.42 of 1993 was illegal and contrary to law and that summons in the said suit were not served upon the present plaintiff. The present defendant appeared before the trial Court and submitted that notices were properly served and from the report of the bailiff, it would clearly appear that the summons of the earlier suit were served upon the brother of the present plaintiff and that the present plaintiff purposefully absented himself and as such, the Court was left with no option, but, to proceed *ex parte*.

2.2 As the parties had joined the issue, the learned trial Court granted an opportunity to the parties to lead the evidence. After hearing both the sides, the learned trial Court dismissed Civil Suit No.95 of 1998. The present appellant-plaintiff, being aggrieved by the said judgement and decree, preferred Regular Civil Appeal No.84 of 2004, which was heard and finally decided by the learned Assistant Judge, Bhavnagar, *vide* his judgement dated 30<sup>th</sup> November, 2004. The learned Appellate Court held that the trial Court was right and justified in dismissing the suit. Being aggrieved by the said judgement and decree passed by the two Courts below, the

appellant is before this Court.

The appeal has been admitted for hearing the parties on the above referred questions.

4. Shri K. A. Dave, learned Counsel for the appellant, submits that from the records, it would clearly appear that the Courts below were not justified in observing that there would be a presumption of service against the present plaintiff and that the brother was served with the notice of the suit, therefore, there was sufficient notice to the present appellant. His submission is that once the learned trial Court had, in the said suit, observed that the defendant be served by substituted service, then, no other mode could be allowed and in any case, the summons could not be served upon the brother of the defendant of the said suit i.e. plaintiff of the present suit.

5. Shri D. A. Surani, learned Counsel for the respondents, on the other hand, submitted that from the records of the two Courts below, it would clearly appear that the present appellant was avoiding service of notice of the said suit, the bailiff in the earlier suit had made reports to the learned Judge that the defendant was

not available and under the circumstances, if the Court had passed an order for substituted service and the notice was served upon an adult male member of the family in accordance with Rule 15 of Order V of the Code of Civil Procedure, then, the Court would be absolutely justified in proceeding *ex parte*. His further submission is that the two Courts below were absolutely justified in dismissing the suit. He also submits that the present plaintiff could not maintain the suit unless he had filed an application under Rule 13 of Order IX of the Code, which was the remedy available to him in the very same suit.

6. So far as the question of maintainability of the suit is concerned, I must immediately negative the argument raised by the learned Counsel for respondent No.1.

7. It is trite law that against grant of an *ex parte* decree, the defendant/s, who has/have suffered the *ex parte* decree, can make an application under Rule 13 of Order IX of the Code and may ask the learned Court to set aside the *ex parte* decree. In such a case, such applicant would be required to satisfy the Court that there was sufficient cause which prevented him from making his

appearance in the Court on the date when the suit was taken up for hearing. In such a case, sufficiency of the cause would only be seen and the merits would not be looked into. One of the grounds, which can be raised in such application, would be that the summons were not duly served or the summons were illegally served. If the Court records a finding that the summons were not duly served or the defendant was prevented by sufficient cause from making his appearance in the Court on the date when the suit was taken up for hearing, then, the Court may set aside the *ex parte* decree and relegate the parties to their original position.

8. A person, who has suffered an *ex parte* decree, would in the alternative be entitled to prefer an appeal against the *ex parte* decree. In such appeal, the question of sufficiency of cause would not be looked into by the Appellate Court. The Appellate Court would look into the merits of the matter and also the circumstances in which the lower Court had proceeded *ex parte*. If the Appellate Court comes to a conclusion that on merits, the suit could not be decreed, then, the appeal would be allowed and the suit would be dismissed. In another set of circumstances if the Court comes to a conclusion that there was no reason for the said Court to proceed *ex*

*parte* or *ex parte* proceedings were not justified, then, such Appellate Court may set aside the *ex parte* judgement and decree and remand the matter back to the trial Court for its disposal in accordance with law.

9. The third option available to a person, who has suffered an *ex parte* decree, would be to file a suit and challenge the *ex parte* decree on the grounds available to him under the law. Such grounds may be that the decree was absolutely illegal, contrary to law, the suit was not maintainable under certain provisions of law, the summons were not served upon him or the summons were illegally served upon some other person who was not entitled to receive the summons or the summons were served contrary to the directions of the Court. In such a case, the Court would look into the merits of the matter and if it records a finding that the summons were not duly served or the summons were illegally served or the summons were served contrary to the directions of the Court, then, such *ex parte* decree would be set aside and the parties would be asked to appear in the first suit, which was decreed *ex parte*. In other cases, if the Court records a finding that the earlier *ex parte* decree was contrary to law or the suit was not maintainable, then, it can declare that the earlier decree was illegal or

contrary to law or void and does not bind the parties to the earlier suit.

Under the circumstances, I must hold that the suit filed by the present plaintiff-appellant is maintainable.

10. From the records and the order passed by the learned first Appellate Court, it appears that the disputed summons, Exh.52, showed that the Process Serving Officer had made certain endorsements, namely, (1) defendant is out of station (on 12/08/1993); (2) defendant had gone to Jasdan (Endorsement dated 09/10/1993); and, (3) defendant was residing at Bombay and would be back in next week (Endorsement dated 4/2/1994). It appears that after all these endorsements, an application for substituted service was filed on 10<sup>th</sup> January, 1995 by the present defendant (plaintiff of the original suit). The Court, accordingly, allowed the application and directed that the summons be served in accordance with Rule 20 of Order V of the Code. When the said Process Server had gone to effect the substituted service, the present plaintiff's brother appeared on the scene and the Process Server served the summons upon him. Thereafter, service report was submitted to the Court and



the Court proceeded *ex parte* in the earlier suit.

11. Rule 20 of Order V of the Code 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."*

Once an application is made to the Court for effecting substituted service and the Court records its satisfaction that there are reasons to believe that the defendant was 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 may 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.

Sub-rule (1) of Rule 20 of Order V also gives a discretion to the Court to serve the notice in such other manner as it thinks fit. In the present matter, it is clear that in the earlier suit, the Court issued a direction that the summons be served by affixture. If that was so, the summons could not be served in such other manner or in any other manner. Unless the Court had exercised its discretion under Rule 20 of Order V directing that the summons be served in such other manner

as the Court thinks fit, summons cannot be served in any other manner.

12. So far as Rule 15 of Order V of the Code is concerned, it gives a discretion to the bailiff to serve the summons upon any adult member of the family, whether male or female, who resides with the noticee-defendant. In the present case, Rule 15 was not observed by the bailiff on any earlier occasion, rather he had reported back to the Court that the defendant was not traceable or was not available for receiving the summons.

13. Rule 17 of Order V of the Code provides that where the defendant refuses to accept the service or cannot be found, then, the bailiff can serve the notice by affixture at the place where the defendant ordinarily resides or carries on business or personally works for gain. After effecting such service, such bailiff (Process Server) shall return the original to the Court from which it was issued, with a report endorsed thereon. Rule 18 provides that the serving officer shall, in all cases in which the summons have been served under Rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a report stating the time when and the manner in which the summons were served, and the name

and address of the person identifying the person served and witnessing the delivery or tender of the summons. Rule 19 of Order V provides that where a summons has returned under Rule 17, the Court shall, if the return under that Rule has not been verified by the affidavit by the serving officer, then, examine the serving officer on oath and then proceed with the matter. In the present case, the process was not served either under Rule 15 or Rule 17 of Order V.

14. In the matter of ***Commissioner of Income Tax, Punjab, Jammu and Kashmir and Himachal Pradesh vs. Daulat Ram Khanna***, [AIR 1967 SC 1552], the Supreme Court has held in paragraph 9 of its judgement that the last ten words in sub-rule (1) of Rule 20 do confer a discretion on the Court to adopt any other manner of service. The sub-rule prescribes one manner which the Court may follow and the said manner consist of two acts: (1) affixing a copy of the summons in the Court house, and (2) affixing it in some conspicuous part of the residential house or business premises of the defendant. The Supreme Court further observed that "if the High Court were right, we would expect that the word 'also' would be repeated and inserted between the word 'or' and 'in' in the last ten words. According to the Supreme Court, "the alternative

manner which the Court decides to adopt for serving must of course be such as gives notice to the person to be served".

This judgement clearly propounds that the Court if does not exercise the alternative authority and relies upon the first part, then, the summons are to be served by affixing a copy in the Court premises and at a place, as provided under first part of sub-rule (1) of Rule 20 of Order V of the Code.

15. Undisputedly, in the present case, despite orders of the Court to effect the substituted service, the summons were not served by affixture, but, a copy of the same was served upon the brother of the said defendant. In a case like the present, the service cannot be held to be a valid service. The service was absolutely illegal and void and it runs contrary to the directions issued by the said Court. Under the circumstances, it must be held that the two Courts below were absolutely unjustified in holding that there would be a presumption of service.

16. Presumption regarding service is not to be drawn in case of Rule 20 of Order V. Presumption of

service would be available in Rule 13 of Order IX when it says that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if the said Court is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

17. Present is not case where an application under Rule 13, Order IX of the Code for setting aside the *ex parte* decree was made, but, present is a case where the defendant submits to the Court that the summons were not duly served, the service was void and present was not a case of irregularity, but, was a case of absolute illegality.

18. The judgement and decree passed by the two Courts below deserve to and are, accordingly, set aside. The plaintiff's suit is decreed. As a consequence of this judgement, the judgement and decree delivered *ex parte* in Civil Suit No.42 of 1993 are also set aside. The plaintiff of this suit would be entitled to proceed with the said suit. The present appellant, who happens to be the defendant in the said suit, shall now be obliged to appear in the said suit. The parties would appear before

the said Court in Civil Suit No.42 of 1993 on 15<sup>th</sup> January, 2007. The present appellant would not be sent any further notice in the said matter because this Court is requiring him to appear in the said suit. The trial Court may proceed with the trial of Civil Suit No.42 of 1993 and may dispose of the said suit in accordance with law. There shall be no order as to costs. Let a decree be framed accordingly.

19. Consequently, Civil Application No.171 of 2005 stands disposed of. Rule is discharged. Interim relief, if any, is vacated.

*[R.S.Garg, J.]*

*kamlesh\**