(1985) 11 KL CK 0035

High Court Of Kerala

Case No: C.R.P. No. 473 of 1985

Kuppuswamy		APPELLANT
	Vs	
M/s Viswam Chits		RESPONDENT

Date of Decision: Nov. 27, 1985

Citation: (1986) 23 KLJ 145

Hon'ble Judges: M. Fathima Beevi, J

Bench: Single Bench

Advocate: V. Chitambaresh and N.S. Sundararaman, for the Appellant; V.P. Mohankumar, K.P. Sreekumar, V. Ramakumar, P. Santhosh Kumar, N. Sankara Menon, Sethumadhavan Kodoth and Prabha K. Pillai, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

M. Fathima Beevi, J.
The revision petitioner is the defendant in a suit which was decreed ex parte. An application filed under O. IX R.13 of the CPC was dismissed by the trial court finding that the summons had been properly served on the defendant and the application is out of time. That order confirmed in appeal is under challenge in this revision. The summons issued to the revision petitioner purports to have been served by affixture. The question raised by learned counsel for the revision petitioner is that the service by affixture in this case cannot be accepted as proper service and that the application having been filed within 30 days of the date of knowledge of the decree should have been allowed by the lower court. The endorsement of the process server on the summons is to the effect that on 10-1-1983 when he went to the residence of the defendant he was not present there and he came to know that the defendant had gone to Sabarimala and therefore the summons was affixed in the outer door of the house. This, according to the revision petitioner, is not proper compliance with the requirements under O. V. R. 17 of the Code and the court below was wrong in having accepted the affixture as proper serviced. The

service by affixture is one of the modes of service of process envisaged under O. V of the Code, But such service is to be under the circumstances referred to in R. 17 of O.V. and in strict compliance with the requirements there under. The Rule provides that service by affixture can be resorted to when after using all due and reasonable diligence the serving officer cannot find the defendant who is absent from his residence at the time when service is sought to be effected on him at his residence and there it no likelihood of his being found at the residence within a reasonable time 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. If the defendant was temporarily absent from the residence when the process server goes to that place for the first time the summons cannot be straightaway affixed at the place as an effective mode of service without making any efforts to ascertain when the defendant would be available and attempting to serve the summons on an agent of the defendant or other adult member of the family as envisaged under the rules. The scheme of the provisions in O. V, of the Code is that personal service has to be attempted and only when that service is found to be not possible either because the defendant cannot be found or because he refuses to accept the summons and the defendant has no agent and no adult member in the house is also willing to be served, then only the service by affixture as provided under R. 17 can be thought of. In a case where there had been no such attempt on the part of the serving officer the service by affixture is ineffective and cannot be accepted as due service. R. 17 as amended by Act 104 of 1976 requires that all due and reasonable diligence has been shown by the serving officer to ascertain the likelihood of the defendant being present at the place of his residence before he proceeds to affix the summons. What would be reasonable time for the purpose of this provision would depend upon the facts and circumstances of each case and has to be determined on the background of the facts attending thereto. If the defendant had been on pilgrimage to Sabarimala it would have been possible for the server to ascertain when he would be back and attempt to serve the summons personally on the defendant on his return. That step has not been taken by the process server The endorsement indicates that he had not enquired as to when the defendant would be available to receive the summons or whether it could be served on any adult member of the family. It is evident that the requirements under the rule have not been resorted to and the circumstances which would justify the affixture of summons did not exist in the case and the service cannot therefore be accepted as proper service.

2. It may be useful to refer to the decisions cited by the learned counsel for the revision petitioner in support of his contentions. In G. Subramania Mudaliar and Others Vs. The Ideal Finance Corporation, Partnership Firm, , it was a case where service by affixture was resorted to when the defendant could not be found at his residence at the first time the serving officer went there. The court held that where it was found that the judgment - debtors were not in their respective residences at the time the process server called, but the process server did not make any attempt to serve the notices on any adult male members of the family in their residences and he straightaway proceeded to affix the notices stating that the judgment-debtors were out of town, no case was made out for

serving the judgment - debtors by affixture and consequently the order of the executing court declaring the judgment - debtors ex parte was without jurisdiction. In Bondla Ramalingam Vs. Shiv Balasiddiah, , referring to O. V, R. 17 of the Code the court pointed out that when the process server goes for the first time to the house of the defendant and if he is not found in the house he has to make efforts as to when he would be available next time and must try to serve on him. The court added that it was his duty to have tried to find out the defendant and serve the summons on him and where for serving the summons for hearing of the suit on the defendant the process server went to the house of the defendant for the first time and on finding that he had gone to another town affixed the summons on the outer door of defendant''s house without making efforts to find out as to when he would be available next time and trying to serve the summons on him, O. V, R. 17 cannot be said to have been complied with and the summons cannot be said to have been duly served within the meaning ''duly served''. The position has been succinctly stated in Tripura Modern Bank Ltd. Vs. Bansen and Co., . What constitutes ''due and reasonable diligence'' has been explained thus:

What constitutes ''due and reasonable diligence'' has been a matter of some controversy. It muse of course depend on the facts add circumstances of each case but it has been firmly established that the mere temporary absence of a defendant from his residence or place of business does not justify service by affixation.

The question as to what was a ''reasonable time'' must be decided against the background of a particular case, and no hard and fast rule can be laid down. If the person is absent from his residence then all possible enquiries are to be made to find out as to when he was likely to return or else when he was likely to be found at his residence. The result of such enquiry must be tested against all the known facts about defendant, his habits, his station in life, his occupation and so forth. There no doubt exist inveterate process dodgers who are bent upon being obstructive. That however is no justification for relaxing the requirements of the law. If determined efforts are made, service can be satisfactorily effected in the majority of cases. In a really difficult case, the Code has] provided an adequate remedy in R. 20 of O. V.

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Where, therefore, a process server goes on three occasions to the residence of the defendant and not having found him there or any ''authorised agent'', the writ is served on the third occasion by affixing it on the outer door, the service is not good.

The effect of the authorities is that a service by affixture should have been resorted to only in a case where there was no likelihood of the defendant being found at the place of residence by the serving officer within a reasonable time as understood by him on adequate enquiries and when the summons cannot be served on an agent or other adult male member of the family as required under the rules.

3. As has been already pointed out in this case, there had been only violation of these requirements in affixing the summons on being told that the defendant is away on his pilgrimage to Sabarimala. The service is not therefore proper and the courts below were clearly in error in having accepted the same as proper service. It has been contended on behalf of the respondent that even if the service is not accepted as proper it would be assumed that the revision petitioner had knowledge of the decree only within 30 days of the date of application and the burden to prove the date of knowledge has not been discharged. In a case where there is no service of summons very little evidence is required to be let in by the defendant regarding the date of knowledge. It has been definitely stated by the revision petitioner that only when the notice in execution was served he came to know about the decree. That, statement can be accepted in the absence of any material to prove the contrary. The courts below, thus in dismissing the application to set aside the ex parte decree have gone wrong and failed to exercise jurisdiction. The orders of the courts below are to be set aside.

In the result, the revision petition is allowed, the interlocutory application stands allowed and the suit restored to file. Parties are directed to appear before the trial court on 2nd February, 1986. Parties shall suffer costs.