
(2000) 02 DEL CK 0124

In the Delhi High Court

Case No : I.A. No. 1542 of 2000 and Suit No. 1549 of 1998

Grafitek International

APPELLANT

Vs

K.K. Kaura and Others

RESPONDENT

Date of Decision : 23-02-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 4

Citation : (2000) 56 DRJ 692

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Maninder Singh and Pratibha K. Singh, for the Appellant; I.C. Kumar, for the Respondent

Final Decision : Allowed

Judgement

Vikramajit Sen, J.—This application has been filed in a suit for the, recovery of Rs. 12,65,532.40 filed under the Summary procedure of Order xxxvI of the Code of Civil Procedure. On 30.7.1998 summons and notice of the application were ordered to issue, to the Defendants: On 10.11.1998, being satisfied the the Defendants 1 and 2 had been duly starved (sic.), and that Defendant No. 3 was deemed to have been served by operation of Order xxxvII Rule 3 of the CPC, the Court proceeded to pass a decree. This was done taking into regard the provisions of Order xxxvII Rule 2(3), C.P.C. Subsequently, execution proceedings were initiated by the plaintiff. The present application under Order xxxvII Rule 4 is a sequel to these happenings.

2. It has been submitted by learned Counsel for the applicants that service had not been properly and legally effected on the Defendants. It is also contended that the decree is liable to be set aside as non est and void for the reason that the plaintiff was not a duly registered partnership firm and the special power of attorney Authorising the signatory of the Plaint" could not be taken into consideration since it had not been notarised. Learned counsel for the plaintiff had accepted notice of this application and has waived his right to file reply

thereto. He had however sought the leave of the court to file relevant documents. This was granted and he had filed photo copies establishing the fact that the plaintiff is a duly registered firm.

3. Mr. I.C. Kumar, the learned counsel for the applicant, has relied on the following judgments viz. P.N. Films Ltd. and Another Vs. Overseas Films Corporation Ltd., , Ramchandra Dhondu Dalvi Vs. Vithaldas Gokuldas, and M.A. Ethirajulu Naidu Vs. T.K.C.K. Panikkar, in support of his argument that in the circumstances of the case it was only possible to resort to Rule 4 of Order xxxvII and not to Order IX of the Code. On this question there is no controversy. What has to be decided is whether the facts of this case fall within the contemplation of Order xxxvII Rule 4.

4. From reading of the decisions cited by Learned Counsel for the applicant as well as from a plain construction of Rule 4 of Order xxxvII it is evident that an ex parte "Summary" decree can be set aside by the Court in two contingencies; either if it is satisfied that service has not been properly effected on the defendants or if sufficient grounds are shown to the Court, that the decree ought to be set aside.

5. On the first point it was contended that Defendants 1 and 2 have not been arrayed as partners of Defendant 3. This is too technical and semantic an objection to be accepted. A complete and holistic reading of the plaint makes it clear that Defendants 1 and 2 are partners of Defendant No. 3. The correctness of this position has not been contested.

6. It has further been contended that the service is extremely suspicious and mysterious since these Defendants live in different States and that it is Therefore not possible that they could have been served on the same day. It was also vehemently submitted that the process server of this Court could not effect service outside its territorial jurisdiction. Learned counsel for the Applicant submitted that the service report appears to indicate that service had been effected on Mrs. Rekha Jain and that Respondent No. 1 had no sister by that name. It has however not been clearly stated that this respondent does not have any sister, or any sister named Rekha. In my view there should have been a clear statement to this effect and having failed to do so it would be fair to assume that there was an intention towards suppression of material facts.

7. It is usually a difficult and delicate task to render a decision on application for setting aside ex parte decrees. The competing interests of the plaintiff and Defendant are broodingly omnipresent. Having obtained a decree the plaintiff ought not to be denied the enjoyment of its delectable fruits on flimsy grounds. There is always the lingering likelihood that service of summons were effected and that the Defendant had not appeared in order to delay proceedings. On the other hand, a judicial decision taken without giving the parties adequate opportunity to present its version of the facts and the law, in my opinion, is a forensic abomination. The Court must fully satisfy itself that parties have been

served. Otherwise it would tantamount to dereliction of duty. I have perused the records of the case in order to ascertain the details of the service. When notice was issued on the first occasion, understandably, the plaintiff was not permitted to carry out dusty service. For reasons which would be best known to the plaintiff, it was only this mode of service which was adopted. Process was not initiated in the ordinary manner and/or by Registered A.D. post as was specifically ordered. Furthermore, and this substantiates the arguments made by Learned Counsel for Defendant/applicant, resort was not made to the office of the District Judge, Gaziabad or Administrative Sub Judge, DELHI. Service was instead allegedly carried out directly.

8. dusty service is supplementary to the modes envisaged under the Civil Procedure Code. It can be resorted to only if specifically allowed by the Court. Even where dusty summons alone have been effected, there is always a likelihood of suspicion surrounding the situation. The present case will demonstrate so. On summons/notice having issued in the ordinary manner as well as by Registered A.D. post, the Defendants would have been hard pressed to create a doubt regarding the service. As presently advised, I am compelled to unequivocally hold that only dusty service is insufficient service, and cannot be acted upon. This is especially so in these cases falling under the purview of Order xxxvII of the Code. I further hold that even if a process server is accompanied by the interested party, the directions contained in the summons notices viz-a-viz. Presentation to the concerned Court outside the territorial jurisdiction of this Court, must be meticulously and scrupulously followed. In the context of the present case this would require the plaintiff to have approached the District Judge within whose jurisdiction the Defendant resided or carried on business.

9. In these circumstances, the application is allowed and the ex parte decree is set aside. In the view that I have taken, I do not consider it necessary to go into the second question, i.e. sufficiency of reasons for acting under Order xxxvI Rule 4.

10. There shall, however, be no order as to costs.