

(2001) 04 DEL CK 0042

In the Delhi High Court

Case No : I.A. No. 6972/98 in Suit No. 3066/96

Shri Bulganin

APPELLANT

Vs

M/s. Apex Apartments Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 12-04-2001

Acts Referred:

Citation : (2001) 4 AD 931 : (2001) 91 DLT 446 : (2001) 59 DRJ 397

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Mr. Arun Khosla and Ms. Manisha, for the Appellant; Mr. Rajeev Mehra, for the Respondent

Judgement

Vikramajit Sen, J.—This is an application filed by the Defendants 1 to 3 under Order IX Rule 13 read with Section 151 of the Civil Procedure Code, 1908 (hereinafter referred to as "C.P.C."). It also contains a prayer for condensation of delay in filing the application u/s 5 of the Limitation Act.

2. The Applicants were proceeded ex parte on 30.9.1997, on which date of hearing the interim orders previously passed, were also made absolute. Subsequent thereto the suit was decreed by Judgment dated 16.3.1998. Thereafter I.A. 3429/98 was filed by the plaintiff praying for possession of the suit premises and for the execution of the Sale Deed in accordance with the Decree. Notice of this application was ordered to issue to the Judgment Debtors/Applicants; and was served on them in the third week of May, 1998. The present application was filed on 12.8.1998. It is averred that none of the Applicants (Defendants 1 to 3) were ever served with a copy of the summons along with the plaint. The Report of the Process Server has been assailed on the grounds that it has been incorrectly recorded therein that the Process Server had met Ms. Alpana Vaid and that she had informed the Process Server that Smt. Manorma Vaid is her sister-in-law. It is binding that the service on Ms. Alpana Vaid is not binding on the defendants. It is next contended that despite orders to the effect that the Summons were to be dispatched to the said Defendants by Registered

A.D. post, this was not so done. A hypertechnical objection has also been raised to the effect that a copy of the plaint did not accompany the Summons. But if this contention is to be considered, it must be presumed that summons were actually served. The delay in moving the application is attributed to the allegation that the file was not available during the summer vacation and that Shri B.S. Mann, Advocate did not render proper professional services.

3. In the Reply it has been emphasised that the application has been filed belatedly and is liable for rejection. It is asserted that after the Defendants were served they had approached the plaintiff to settle the matter, but on most unreasonable terms. The copy of the Decree as also the Bank Draft of Rs.90,000/- was tendered by a clerk of the plaintiff's Advocate, and on its refusal was dispatched by Speed Post but was again refused. This envelope was opened on 28.4.1998 in Court. Thereafter the plaintiff was directed to prepare a fresh Bank Draft for a sum of Rs.90,000/- in favor of the Registrar of this Court. Another hapless flat buyer, namely, Smt. Savitri Dhawan had also filed a suit and it is averred that the Defendants were well aware of and were watching the present proceedings.

4. By The CPC (Amendment) Act, 1976, Rule 19-A was introduced into Order V of the C.P.C. on a reading thereof it is apparent that service by Registered A.D. post, in addition to personal service, is now the normal rule. This mode of service may be dispensed with if the Court considers it unnecessary. In the present case, however, it will be recalled that the court had ordered service on the Defendants by Registered A.D. Post also, but these directions have not been complied with by the plaintiff at all. Order IX Rule 13 thereafter mentions that where a decree has been passed ex parte against a defendant, he may apply for setting it aside and on his disclosing that he was not duly served, the decree may be set aside. The second proviso, however, mentions that even if there has been an irregularity in the service of summons, if the Court is satisfied that the defendant had notice of the hearing, such a decree would not be liable to be set aside. Would the proviso cover instances where there has been failure to initiate service by Registered A.D. post is a question which immediately arises and needs to be answered. When this provision is read in juxtaposition with Order V Rule 19-A of the CPC it is clear that the failure to initiate steps for service by Registered A.D. post would not fall within the phrase "irregularity in the service of summons". It would be extremely dangerous to hold otherwise. Take the case where service is ordered by both modes. It would not be too sanguine to postulate the possibility of plaintiff obtaining/procuring a false service report from the Process Server. It may also be possible for the plaintiff to obtain a false report of "refusal" from the Postman concerned, but this is somewhat difficult since the plaintiff would have to locate the Postman in the Defendant's area and then prevail upon him to make a false endorsement. Where summons have been served duly there is always a needle of suspicion pointing towards a manipulated service report. It is a legal anathema for a decision to be given without hearing both parties. Wherever benefit of doubt has to be given, it must be exercised in such a

manner as to afford an opportunity of being heard, in favor of the absent party. It is, Therefore, prudent for the plaintiff/Applicant to fully satisfy himself that ex parte orders are passed only in those cases where it is beyond doubt that the opposite party has been served. Chapter XXI of the Delhi High Court (Original Side) Rules, 1967 (hereinafter referred to as "the Original Side Rules") may also be adverted to. Rule 1 of the Original Side Rules states that a Party must be personally served. This is in consonance with Rules 12 and 13 of Order V of the Code of Civil Procedure. However, Rule 15 of the same Order ought not to be overlooked since it mentions that where personal service is not possible, such a party may be served by any adult member of the family, whether male or female. Rule 10 of the Original Side Rules requires the Process Server to make out a full report and should be read with Rule 12 of the Original Side Rules. While on this subject it is plainly clear that sub-rule (4) of Rule 12 of the Original Side Rules cannot be given effect to as it runs counter to Rule 15 of Order V of the CPC and is quite palpably a legal anachronism. There is also no report, in the present case, to the effect that the Summons were affixed to the outer door, as is contemplated by Rule 13 of the Original Side Rules. The next following Rule is most often not given due compliance. It is recommended that the Registrar should meticulously follow its provisions so that legal proceedings should not be needlessly protracted. In the present case affidavits of service were not called for and the Registrar appears not to have recorded his satisfaction to the effect that the Defendants had been served. It will also be relevant to keep in mind that none of the Defendants have been personally served. In this context I may draw attention towards the decision in *Kunja Vs. Lalaram and Others*, .

5. Mr. Rajeev Mehra, learned counsel appearing on behalf of Applicants/Judgment Debtors had relied on the decisions rendered in *Singh Vs. Purbia*, and *Bimla Wati Sharma Vs. State Bank of Patiala*, , in support of his proposition that there can be no valid service if a copy of the plaint has not been served. In the view that I have preferred, I need not go into this submission further. I may only mention that this may at best be an example of "irregularity in service of summons" as envisaged in the second proviso to Order IX Rule 13 of the Code of Civil Procedure.

6. From a perusal of the records of this case it is evident that efforts to serve the Defendants were taken on only one occasion, after notice was issued on 18.12.1996. On the next date the matter was simply ex parte. dusty orders were only in respect of the application for interim relief. The Courts are understandably hesitant to order dusty service at the first instance. Not only did the plaintiff fail to initiate appropriate steps for service by Registered A.D. post, but he also served the summons in the suit dusty without the authority or direction of the Court. Where a party accompanies the Process Server there is always scope for harbouring suspicion that the service report may have been managed. In these circumstances I am in no manner of doubt that all necessary facts were not brought to the Court's notice when the initial order whereby the Defendants were proceeded ex parte was passed. In Suit No. 1549 of 1998 entitled *Grafitek*

International v. K.K. Kaura & Others decided on February 23, 2000, I had inter alias declined to accept dusty service only as effective notice to the Defendant. The view taken then continues to prevail. I had stated that "It is usually a difficult and delicate task to render a decision on applications 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".

7. The question that immediately arises is whether the Defendants are entitled to the relief claimed for. As per their own admission they were served in May 1998 with the copy of the application seeking necessary orders subsequent to the passing of the Decree. They neglected altogether to immediately inspect the Court file. They even allowed the whole of July to pass by without inspecting these records. The conduct of the Defendants would logically show that their intention was to delay the proceedings. However, in cases where the Court is satisfied that the Defendants have not been properly served, it must not be inhibited or feel impeded by rules of limitation in correcting an injustice which has been caused. Order IX Rule 13 envisages two possibilities (a) failure of service and (b) failure to appear for sufficient reasons. In the latter case it is essential that the period of limitation should be rigorously applied against the party concerned, but not in the former.

8. In these circumstances the ex parte order is set aside. However, even if the counsel for the Defendants had remiss and negligent in taking necessary steps for moving the present application under Order IX Rule 13 within the prescribed period, it does not excuse the party itself from diligently following up its remedies and safeguarding its interests. Where the parties are educated businessmen, granting too much indulgence and latitude to them would itself cause injustice. The delay is condoned and the application is accordingly allowed, subject to payment of Rs.10,000/- as costs.

I.As. 3429/98 & 7062/98

9. The ex parte Decree has been recalled. The applications are, Therefore, rendered infructuous.

10. Dismissed as having become infructuous.