

(2002) 04 CAL CK 0045

In the Calcutta High Court

Case No : G.A. No's. 3713 of 1998 and 3468 of 1999 and Civil Suit No. 382 of 1998

Sri Kamalesh Adhikary

APPELLANT

Vs

Dakshin Damodar Cold Storage Private Limited

RESPONDENT

Date of Decision : 23-04-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 1, Order 9 Rule 13, 151
Evidence Act, 1872 — Section 114
Limitation Act, 1963 — Section 5

Citation : (2002) 3 CALLT 188

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Advocate : Hirak Kr. Mitter and Sudip Kr. Ghosh, for the Appellant; Raja Roychowdhury, for the Respondent

Final Decision : Dismissed

Judgement

Amitava Lala, J.—On 30th March, 1999 a decree was passed by this Court in the undefended suit. For the purpose of placement of suits under the heading "undefended suit" in the Court of Law one has to cross various procedural avenues laid down under Original Side Rules of this Court. Such Rules are pari materia with the Code of Civil Procedure. Sometimes Court directs to place the matter under the heading "undefended suit" under very special circumstances. Unlike the District Courts, regular cause lists are printed from which one can see that suits or proceedings are reflected in such lists. Under normal courses of proceeding, the suit has to be placed in the prospective list, thereafter in the warning list and lastly under peremptory list of the Judge. Even where, the Court directs to place the matter under "undefended suit" Court has to be satisfied with the test of service on the basis of the certificates to be issued by the Registrar/Deputy Registrar/ Deputy Sheriff etc. There is no need of disbelieving their certificates being the part and parcel of the judicial system. Therefore, Court proceeds on the basis of such certificate or certificates.

2. In the instant case, I find two applications were made. One application is u/s 5 of the Limitation Act and another is under Order 9 Rule 13 of CPC read with Section 151 of the same. Both were made sometimes in August, 1999. Admittedly, there is a delay of 105 days in making such application. In Original Side, a conjoint application is needed to be moved. However, to avoid the technicalities Court received both the applications even after making separately.

3. According to me, there is a gulf difference in between hearing the suit ex parte and hearing the suit under category of "undefended suit". In hearing the application for setting aside the decree passed ex parte, Court has to proceed with two conditions as under Order 9 Rule 13 of the Code of Civil Procedure; (a) if one satisfies the Court that the summons were not duly served; (b) if one is prevented by sufficient cause from appearing when the suit was called on for hearing.

4. Here there is no question of prevention by sufficient cause when one chooses not to appear and the suit is placed under the heading "undefended suit" on the basis of the appropriate certificate issued by the officer of the Court, Hence, the next test would be whether the summons were duly served upon the defendant or not. Mr. Hirak Kumar Mitter, learned senior counsel, appearing in support of the petitioner harped on such point repeatedly to get into the provision of Order 9 Rule 13 of the Code of Civil Procedure. Firstly, according to him, there was no office of the defendant company at 10A, Rabindra Sarani, Calcutta-700014. But when the plaintiff served a sub-peon upon the Registrar of Companies to produce the record and the same was produced before the Court it appeared that the same was the correct address of the company's registered office. Mr. Mitter in presence of the Court, perused the record and voluntarily withdrawn himself from making any submission in connection thereto. Court examined the representative of the Registrar of Companies as witness. I have taken note of the documents produced from the record in respect of the service of the writ of summons upon the company and it appears to this Court that the registered envelope returned un-served. I have also gone through the office note of the process server. It appears from there that one authorised representative Sekh Sabir Ali refused to take service of the writ of summons. According to Mr. Mitter the process server should be examined by the Court. It is true but the question is at whose instance such process server will be examined? Definitely he should be examined at the instance of the defendant who is questioning the service. Onus is upon him to examine by issuance of sub poena. Court has no material to disbelieve his own administrative staff. Court has to proceed on the good faith of the staffs who are administering the justice. Therefore, when the process server has not been called upon by the petitioner a presumption can be safely drawn as against him particularly when it appears that the petitioner made wrong submission about the Registered head office of the company.

5. Mr. Mitter further argued that although they have their registered office at Calcutta by they are, in fact, carrying on business outside Calcutta. However, this

part of the argument is militating with the argument as above about the non-service of writ of summons in the office of the petitioner company. Either they have to accept the position that writ, of summons was not served upon the company or they could have served upon the actual place of business outside the city as well. It appears that learned counsel wanted to open all avenues in order to get an order of recalling or setting aside the decree by hook or by crook.

6. Mr. Mitter cited a judgment reported in 1997 WLR 365 (Hansraj Sharma v. Gopal Prosad Seth) and said that upon examination of the postal peon when it was found by the Court that there was no intrinsic evidence to come to a conclusion that postal envelope was refused by the defendant therein decree was recalled and/or set aside. Firstly, according to me, such judgment can, at best, have a persuasive value. Secondly, it should have been similarly placed with the factual description of the present case, then and then alone such persuasive value can be able to influence the Court in coming to a similar conclusion. In the cited judgment, the dispute was in respect of endorsement of postal peon who made remark as refused but the same was accepted by the Court because: (a) The Court was not satisfied with the testimony of the bailiff; (b) Other signatory being the witness was not examined; (c) The postal peon allegedly tendered the registered envelop withholding re-examination. On the contrary, in the instant case, the petitioner did not call upon the process server to examine on the contrary wanted to shift the onus even upon the Court as if Court suo motu call upon the process server to give evidence on the basis of his verbal submission.

7. Mr. Mitter cited a three Judges' Bench judgment reported in 20 CWN 173 (Kossim Ebrahim Saleji v. Johurmull Khemka) and said that where there is a question of substituted service the requirements of the Court should be strictly observed in every respect even though the defendant knew about the issue of the writ of summons. There the serving officer went to defendant's place of business and not finding him on three separate occasions pasted a copy of the writ on the outer door of the said house which he erroneously believed to be the defendant's ordinary place of business was not sufficient service of summons.

8. According to me, firstly there is a centurion difference of thought about the technicalities of service of writ of summons between then and now. Secondly Order 5 Rule 1 of the CPC says that writ of summons may be served but not shall be served. Therefore test of reasonableness by the Court is fulfillment of principles of audi alteram partem alone. If the Court is satisfied with the test no further test is required to be made. Thirdly there is a factual difference in between aforesaid case and the present case. An additional service by affixation cannot be equated with substituted service. In the instant case service by affixation is additional service. Fourthly, refusal by the authorised representative is a good service. Fifthly, whether the person refused to receive service is authorised or not a process server cannot scrutinise the same. He has to proceed on the representation of the person present in the office or residence of the defendant. There is no denial that where the service was effected is not the

registered head office of the company. Sixthly, the process server will have to go by the address given in the plaint and writ of summons. He is not supposed to know whether the defendant is effectually carrying out business elsewhere outside the jurisdiction of the Court or not. Seventhly, the process server is not the postal peon so that he is unaware of the procedure of service and his report on the writ of summons will be disbelieved in usual course. Process servers are part and parcel of the judicial system. If one wants to disbelieve him or them, he has to come with clean hands with a specific case serve by serving sub poena and then examine him/them and prove the non-service, if any, for discharging his onus. Lastly, the petitioner/ defendant failed to earn faith from the Court when it appeared that it has made false statement earlier about the very existence of the Registered Head Office of the company where the service was effected. To that the plaintiff/respondent discharged onus by proving such service.

9. Mr. Raja Roychowdhury, learned counsel appearing for the respondent contended that in 1998(2) CLJ 424 (Purnima Dutt and Ors. v. Ratan Kanti Sur and Ors.) this Court relied upon a Supreme Court judgment reported in Salil Dutta Vs. T.M. and M.C. Private Ltd., where it was held that a company run in the city by the educated persons having knowledge cannot be equated with rustic villagers.

10. Moreover, this is not a case of returned unserved so that a defaulting party can get benefit of it. u/s 114 of the Evidence Act, Court may presume the existence of any fact which it thinks to have likely happened regard being had to the common course of natural events, human conduct, private and public business, in their relation to the facts of a particular case. Sheriff has served under due diligence. Burden of proof lies with the petitioner to rebut the presumption and they fail to discharge the same. Therefore, it is an admitted position that service was effected. He distinguished the judgment reported in 20 CWN 173 (supra) and contended that service on the domicile or the residence of the company is proper service. He further contended that in such judgment Court refused to recall and set aside the decree. He also contended that it is not a question of identification of Mr. Sabir Ali, who declared himself representative of the company and refused but the service was effected its domicile or residence. Upon relying on 1998(2) CLJ 424 (supra) he contended that illness of a Director cannot be the ground for not entering upon the suit or proceeding which they are belatedly trying to establish.

11. A further point was taken by the petitioner about applicability of Section 26 of the West Bengal Cold Storage (Licensing and Regulation) Act, 1966. Section 26 says that no suit or legal proceeding shall lie against the State Government and no suit, prosecution or legal proceeding shall lie against any person or anything in good faith done or intended to be done and the Rules made thereunder. Petitioner cited a judgment reported in 1998 WLR 483 (Union Bank of India v. The Bhulandararee Coal Co. Ltd. and Ors.) to establish that when a decree is a nullity it can be recalled or set aside at any point of time. He has also

relied upon *Sunderlal and Sons Vs. Yagendra Nath Singh and Another*, on the self-same issue.

12. I have taken note of each and every fact of the case. According to me, when a person wanted to invoke discretionary jurisdiction he/she or it should come with clean hands. Such clean hands should be ornamented with uniform logical stand. In the instant case, facts are twisted to fit in the favourable judgment. As a result whereof four different categories of submissions were made out. If one is aggrieved for non-service of writ of summons he will stand on such footing uniformly. This is not such case, onus to prove the non-service is not discharged. Facts are wanted to establish in reply giving a complete go-bye to the original case. It is hardly believable fact that a company will rely only upon a Director who purportedly carries business out of the city of Calcutta. The explanation as to the condonation of delay is not at all firm. Responsibility of the defendant company cannot be solely casted on the shoulder of the learned advocate appearing for them. The application of Section 25 of the West Bengal Cold Storage (Licensing and Regulation) Act, 1966, is totally misconceived. It is only applicable as against the State Government or any person entrusted under the Act to render service on the part of the State like Licensing Officer etc. It has got nothing to do in a dispute between two parties in a civil dispute. Neither of the cited decisions has any legal support in the facts of this case. It is a complete lost case on the part of the petitioners. They are not aware to make the application in proper format be it in the cause title or be it in the body of applications apart from making separate applications. However, ignoring technicalities and hypertechnicalities even in merit, there is no sustainable proof to establish that writ of summons was not served. In absence of the same, the scope and ambit of the Order 9 Rule 13 of the CPC cannot be applicable. Therefore, the only scope is to apply the principle laid down u/s 151 of the Code which either operates for the ends of justice or to prevent of abuse or the process of the Court of Law and taking into balancing factors in between these two parties I am confident that the application in merit is absolutely frivolous and share abuse of process of Court of Law. In effect both the applications either for condonation of delay or for recalling and/or setting aside the decree cannot be sustained. Since I have applied my mind in merit the applications ought to be dismissed on both the accounts accordingly the applications are dismissed. No order as to costs.

Prayer for stay is made, considered and refused.

Xeroxed certified copies of this judgment will be supplied to the parties within seven days from the date of putting requisites for drawing up and completion of the Order and certified copy of this judgment.

All parties are to act on a signed copy minute of the operative part of this judgment on the usual undertaking and subject to satisfaction of the Officer of the Court in respect as above.