Siba Prasad Saha Vs Gouranga Mohan Saha and Others

Court: Calcutta High Court

Date of Decision: June 14, 2011

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 5 Rule 17, Order 5 Rule 19, Order 5 Rule 19A

Citation: (2011) 4 CHN 195

Hon'ble Judges: Dipankar Datta, J

Bench: Single Bench

Advocate: Suchit Kumar Banerjee and Indranil Banerjee, for the Appellant; Upendra Roy, for the Respondent

Final Decision: Allowed

Judgement

Dipankar Datta, J.
The Petitioner is the first Defendant in Title Suit No. 88/2007, pending on the file of the learned Civil Judge (Junior

Division) 5th Court, South 24 Parganas at Alipore, instituted by the first opposite party (hereafter the Plaintiff). It is a suit for declaration and

permanent injunction.

2. By an order passed by the learned Judge on November 17, 2009, the suit was to proceed ex-party against the Petitioner and the second

Defendant since they had refused summonses when tendered and were not contesting it by entering appearance. However, the Plaintiff was

directed to take steps for service on the other Defendants.

3. It was at this stage that the Petitioner filed an application. It was alleged therein that he had no notice of institution of the suit and was, therefore,

unable to enter appearance. He had heard in the locality that the Plaintiff had instituted a civil suit against him and several others, where after he

contacted a learned advocate who filed an application for information on September 20, 2010. The information that was furnished revealed that a

civil suit had in fact been instituted by the Plaintiff and that a date had been fixed on November 16, 2010. A prayer was accordingly made for

vacating the order dated November 17, 2009 and to allow the Petitioner to enter appearance and to file his written statement.

4. The application was taken up for consideration by the learned Judge on November 16, 2010. On perusal of the records of the suit, he formed

an opinion, based on the report of the process server dated May 17, 2007, that summons was refused by the Petitioner. The prayer of the

Petitioner thus stood rejected on contest, without cost. Noticing that there was no service return in respect of the third to fifth Defendants, it was

observed that fresh summonses ought to be served upon them and the Plaintiff was, accordingly, directed to take steps in this behalf within seven

days.

5. Mr. Banerjee, learned advocate representing the Petitioner contended that the learned Judge committed gross jurisdictional error in rejecting his

prayer by placing complete reliance on the report of the process server. He invited the attention of the Court to provisions contained in Order V

Rule 19 of the CPC (hereafter the Code) together with its amendment effected by this Court and contended that the provisions thereof had been

observed in the breach rendering the order impugned vulnerable. According to him, the process server''s report manifests that it is not in the form

of a declaration, duly verified, and therefore he ought to have been examined by the Court on oath before a declaration could be made that the

summons was duly served on the Petitioner. The learned Judge while making the impugned order having failed to take note of the provisions of

Order V Rule 19 of the Code, he contended that the same is indefensible.

6. Mr. Banerjee relied on various decisions, viz. Bhagwan Singh and Others Vs. Ram Balak Singh and Another, Kunja Vs. Lalaram and Others, ,

Sambhunath Das Vs. Sirish Ch. Mohapatra, Prakash Chander Vs. Smt. Sunder Bai and Another, Parasurama Odayar Vs. Appadurai Chetty and

Others, and AIR 1923 Mad 27 (Karuthan Ambalam v. M. Doraiswamy Iyengar & Bros.) for the proposition that if there has been no declaration

of due service in the manner as ordained by Order V Rule 19, service cannot be treated to have been effected in accordance with law. There

being serious miscarriage of justice, he urged Court to intervene.

7. Mr. Roy, learned advocate appearing for the Plaintiff, on the contrary contended that the Petitioner was all along aware of institution of the suit

and that the application filed by him is nothing but part of a dilatory strategy to buy time and to procrastinate the suit. He contended that the learned

Judge while making the order dated November 17, 2009 had reached a satisfaction that the Petitioner had refused to receive the summons when

tendered to him, which amounts to good service. Not only that, the learned Judge while making the impugned order noted that summons sought to

be served on the Petitioner by the process server was refused and the same was affixed on the front door of his residence, as is evident from his

report. He urged that no illegality was committed by the learned Judge in rejecting the prayer of the Petitioner and, therefore, the revisional

application merits outright dismissal.

8. I have heard learned advocates for the parties and also perused the records of the suit.

9. In its decision in Parasurama (supra), the Full Bench of the Madras High Court examined the issue of effect of non-compliance with the

provisions of Order V Rule 19 of the Code relating to service of summons in great detail.

10. Hon''ble Venkataraman, J. in the leading judgment observed in paragraph 45 as follows:

45. In the result, I would answer the reference thus: Where the judgment-debtor files an application to have the execution sale declared void and

the application is filed beyond thirty days from the date of the sale, if the decree-holder or the auction purchaser wants to defeat the application by

urging that the application should have been filed within thirty days of the date of the sale under Article 166 of the Limitation Act of 1908 (or the

corresponding Article 127 of the Act of 1963), for the reason that the summons had been duly served by affixture on the judgment-debtor as

required by Order 5, Rule 19 it is necessary that there should have been strict compliance with the provisions of Order 5, Rule 19 by the executing

Court when it proceeded to hold the sale in the absence of the judgment-debtor. In particular, where the return of the process server under Rule

17 has not already been verified by the affidavit of the serving officer the Court shall examine the serving officer on oath or cause him to be so

examined by another Court touching his proceedings. It should also declare expressly that the summons has been duly served, though the exact

form of that declaration may be in any convenient form, such as, ''it is declared that the Defendant has been duly served'' or ''it is declared that the

service is sufficient'' or simply ''Defendant duly served'' or ''service sufficient''. What is important is that the endorsement of the Court itself should

indicate that the presiding officer has applied his mind and considers that the summons has been duly served.

11. In his concurring opinion, Hon''ble Ramakrishnan, J. observed in paragraph 56 as follows:

56. To conclude, the point raised by Kailasam, J. for the answer of the Bench is whether the non-compliance of the requirements of Order 5, Rule

19, CPC would make the service of the summons ineffective. Our answer to this question is this: Where there is no affidavit of the serving officer,

and where the serving officer is not subsequently examined by the Court, as found by the learned Judge in this case, there is non-compliance with

the first part of Order 5, Rule 19, CPC and the service is ineffective. Next, the safe rule is to look for an explicit declaration of due service as

enjoined by the second part of Order 5, Rule 19, CPC In its absence, particularly in cases where valuable rights of parties are sought to be placed

in jeopardy for example by the application of the principle of the law of limitation or of the rule of constructive res judicator, and where it is

doubtful if the affected party had notice of the proceedings proposed to be taken against him, grave prejudice can be caused. The case dealt with

by Horwill, J. covered an exceptional situation where the circumstances left no doubt whatever that the executing Court would have made the

necessary declaration about the sufficiency of service, and therefore, the failure to make an explicit declaration was treated as a mere omission

which can be overlooked. In our view, this decision must be confined to the facts of that particular case, and cannot be taken as laying down any

general rule. On the other hand, it may very well happen that the circumstances are by no means conclusive, and there can be serious doubt about

the sufficiency of the service for giving notice to the affected party. Therefore, I am inclined to the view that an explicit declaration should be

insisted on. As stated by Venkataraman J., no precise form for such declaration need be laid down; any declaration or statement by the concerned

Court, in the record, which would clearly show that it had applied its mind to the sufficiency of service will very well do for the purpose.

12. No decision of any other High Court taking a view contrary to the one expressed by the Madras High Court has been placed before me. On

the contrary, the other decisions cited by Mr. Banerjee, referred to above, are consistent with the view expressed by the Madras High Court in

Parasurama (supra).

13. Rules 19 and 19A of Order V of the Code, as applicable to civil courts subordinate to this Court, read as under:

Rule 19.-Where a summons is returned under Rule 17, the Court shall, if the return under that rule has not been verified by the declaration of the

serving officer, and may, if it has been so verified, examine the serving officer, on oath, or cause him to be so examined by another Court, touching

his proceedings, and may make such further inquiry in the matter as it thinks fit, and shall either declare that the summons has been duly served or

order such service as it thinks fit.

19-A. A declaration made and subscribed by a serving officer shall be received as evidence of the facts as to the service or attempted service of

the summons.

14. The mandatory requirement of Rule 19 is that if the return of the rule is not verified by the declaration of the serving officer, it would be the duty

of the Court to examine him on oath or to get him examined by another Court touching his proceedings or to direct such enquiry in the matter it

thinks fit and, thereafter, to declare that summons has been duly served or to order service. In terms of Rule 19A, it is only a declaration made and

subscribed by the serving officer that could be received in evidence.

15. On perusal of the records of the suit, I do not find that the provisions of the first part of Order V Rule 19 of the Code have been complied

with. The report of the process server, in the first place, did not contain a declaration, duly verified, that the Petitioner had refused to accept the

summons, whereupon the same was affixed on the front door of his residence in presence of witnesses. In the absence of such declaration, duly

verified, it was the duty of the learned Judge to either examine the serving officer on oath or cause him to be examined by another Court touching

his proceeding or direct such further enquiry in the matter as he thought fit before declaring that the summons had been duly served on the

Petitioner.

16. I am of the considered view, for reasons recorded above, that there has been no compliance of the provisions of Order V Rule 19 of the

Code, thereby rendering the report of the process server inconclusive and inoperative and on this ground alone the order under challenge cannot

sustain in law.

17. The revisional application succeeds. Order dated November 16, 2010 passed by the learned Judge stands set aside. Written statement filed

by the Petitioner shall be accepted by the learned Judge and the suit shall henceforth proceed in accordance with law.

18. There shall be no order as to costs.

19. The records of the trial Court be transmitted to it at once. Urgent Photostat certified copy of this judgment and order, if applied, may be

furnished to the applicant at an early date.