

(2013) 09 CAL CK 0016

Calcutta High Court

Case No: A.P.O. No. 41 of 2013, C.S. No. 285 of 1998 and A.P.O. No. 42 of 2013, C.S. No. 286 of 1998

Hanjin Shipping Co. Ltd.

APPELLANT

Vs

A. Tosh and Sons (I) Ltd. and
Others

RESPONDENT

Date of Decision: Sept. 13, 2013

Citation: (2013) 4 CHN 698

Hon'ble Judges: Mrinal Kanti Chaudhuri, J; Ashim Kumar Banerjee, J

Bench: Division Bench

Advocate: P.K. Das, Ms. Nilanjana Addya and Ms. Sumita Ghoshal, for the Appellant; Ravi Kapoor, S. Sengupta, Meghajit Mukherjee and Ms. Koeliya Banerjee, for the Respondent

Final Decision: Dismissed

Judgement

Ashim Kumar Banerjee, J.

SUBJECT CONTROVERSY:

1. Plaintiff filed the suit as against three defendants. The defendant No. 1 is A Shipping Company having its head office at Korea. The defendant No. 3 is also a Foreign Company having its office at London. The defendant No. 2 is an Indian Insurance Company. We are concerned with defendant No. 1 and 3. The plaintiff filed the suit as against the defendants, inter-alia claiming damage to the Cargo transported by the defendant No. 1 from the Port of Calcutta to the Port of Felixstowe by "M.V. CHOYANG ARK". The plaintiff served writ of summons upon the defendant No. 1. The plaintiff also attempted service upon the respondent No. 3. However, the service return appearing at pages 21-22 would show, the Sheriff's office received postal acknowledgement receipt for the defendant No. 2 however, did not receive anything in respect of defendant No. 1 and 3. The present appeal would relate to service return of the defendant No. 3 appearing at pages 25-38. It appears, plaintiff claimed money decree as against the defendants jointly and

severally and in the alternative, an inquiry into damages as against defendant No. 1 and 2. In paragraph 15, the plaintiff stated "the plaintiff claimed no relief against pro forma defendant No. 3 but it is proper that the adjudication of the dispute be heard in its presence." The suit came up for hearing before the Learned Single Judge when the defendant No. 1 filed an application for dismissal of the suit on the ground, in absence of summons being served upon the defendant No. 3 the suit should be dismissed. The learned Judge declined, hence this appeal.

CONTENTIONS:

2. Mr. Swapan Kumar Das learned Counsel appearing for the appellant would refer to relevant provisions of the CPC as well as the High Court Rules in its Original Side and contended, once the plaintiff averred, presence of defendant No. 3 was a must, non-service upon the defendant No. 3 would automatically attract dismissal of the suit. He would rely upon two decision of this Court [Shyam Narayan Prasad Vs. Benoy Kumar Chourasia](#), and Kshitish Chandra Kayal Vs. Abinash Chandra Halder reported in 1986 CWN 100) and a decision of the Madras High Court ([Parasurama Odayar Vs. Appadurai Chetty and Others](#), to support his contention.

3. Per contra, Mr. Ravi Kapoor, learned Counsel would refer to Order V Rule 19 of the CPC to contend, once the writ of summon was duly sent by registered post with acknowledgement due at the recorded address of the defendant No. 3 and neither the acknowledgement card nor the undelivered packet came back, it would be presumed, the writ of summon was duly served upon the concerned defendant. He would, however, admit such presumption was rebuttable at the instance of the concerned defendant. He would rely upon the proviso to Rule 9 Sub-rule 5 where it was stipulated, "where the summons was properly addressed, prepaid and duly sent by registered post with acknowledgement due, the declaration referred to in this sun-rule shall be made notwithstanding the fact that the acknowledgement having been lost all mislead, all for any other reason, has not been received by the Court within 30 days from the date of issue of summons."

4. He would contend, Rule 9A came in force in 2002 when the proviso to the earlier rule was removed however, the same would have no application as the concerned writ of summon was served in 1998. In any event, the defendant No. 3 was a pro-forma defendant. He would rely upon the Apex Court decision in the case of [Basant Singh and Another Vs. Roman Catholic Mission](#),

CASES CITED:

5. Before going into the issue, let us first discuss the law contained in the precedents cited at the bar.

i) Parasurama Odayar Vs. Appadurai Chetty and Ors.:

6. Mr. Das relied on paragraph 45 and 46. While dealing with Order V Rule 19 of the earlier Code of Civil Procedure, the Division Bench of the Madras High Court

observed, "Express declaration of due service was a must and the Court must apply its mind to come to the conclusion the service was duly effected".

ii) Kshitish Chandra Kayal Vs. Abinash Chandra Haldar:

7. The learned Single Judge of this Court observed, in view of provisions of Order V Rule 19 of the Code the Court issuing in summons, has to be satisfied about the sufficiency of the service.

iii) Shyam Narayan Prasad Vs. Benoy Kumar Chourasia:

8. Order V Rule 19A(2) came up for consideration the Division Bench of this Court when this Court observed, the Court shall declare, due service has been effected. While doing so, the Court would have to consider the report of the postal peon.

iv) Basant Singh Vs. Roman Catholic Mission:

9. The Apex Court considered Order V Rule 19A(2) proviso and observed, "Once it is proved that the summons were sent by the registered post to correct and given address, the defendant's own conduct becomes important". The Apex Court further observed, presumption as to service was to be rebutted by the defendant complaining non-service.

OUR VIEW:

10. The defendant No. 3 is not a necessary party, as we find from the plaint. Even if we hold writ of summon was not served properly upon the defendant No. 3 the suit would still proceed as against defendant No. 1 and 2. The plaintiff would however, be handicapped, as according to the plaintiff, its presence was necessary. Similarly, the other defendants could take advantage of the absence if they can; however, mere non-service on the defendant No. 3 cannot ipso facto warrant dismissal of the suit as against all the defendants. We are of the opinion, even if we give full credence to what the defendant No. 1 would complain, we would not be in a position to agree with their ultimate prayer for dismissal of the suit as a whole.

11. Keeping it in mind, let us now find out as to whether the plaintiff could discharge its onus on service of summons. Order V Rule 9 as discussed herein before, would require summons to be served upon the defendant in the manner stipulated therein. One of the manners as suggested, would be service through registered post with acknowledgement due. Proviso to sub rule 5 would have presumption of service upon expiry of thirty days period. The Sheriff's report appearing at pages 21-22 would definitely permit presumption of service as contained in the proviso to sub rule 5. Rule 19 (Calcutta amendment) would provide, when a summon was returned under rule 17 (under rule 17 procedure was laid down where defendant could not be found during personal service) the Court would examine the serving officer on oath and make such further enquiry in the matter before it would declare, service was duly effected. Rule 19A would suggest, a declaration should be made

and subscribed by a serving officer as regard service and/or attempted service. Rule 19A was subsequently repealed with effect from July 1, 2002 hence, in 1998 the Court was to rely upon the report of the Sheriff and presume, service was duly affected. Such presumption, either on the basis of the proviso to under Order V Rule 9 Sub-rule 5 or under Rule 19A, could only be rebutted at the instance of the defendant who was alleged to have not been served.

CONCLUSION:

12. We unhesitatingly hold, the summon was duly served as presumed under Order V Rule 9(5) proviso in absence of any effective rebuttal that too, at the instance of the defendant No. 3. The Court was thus entitled to proceed with the hearing. The appeal thus fails and is hereby dismissed. There would however, be no order as to costs.

Dr. Mrinal Kanti Chaudhuri, J.

I agree.