Pritam Sen Vs Smt. Swastika Sen (Mukherjee)

Court: Calcutta High Court

Date of Decision: Sept. 25, 2008

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

Citation: (2009) 2 CALLT 142

Hon'ble Judges: Maharaj Sinha, J

Bench: Single Bench

Advocate: Krishnendu Gooptu and Mr. C. K. Saha, for the Appellant; Malay Kr. Ghose and Mr. S.K. Trivedi, for the Respondent

Final Decision: Dismissed

Judgement

Maharaj Sinha, J.
On 16 April 2007, when the plaintiff was about to complete his evidence, learned counsel engaged by the sole

defendant appeared in Court for the first time and submitted that the defendant was willing to defend the suit and for such purpose the defendant

would make necessary application for obtaining leave to enter appearance and seek direction for filing a written statement to contest the suit

instituted by the plaintiff in this Court. When this prayer was made on behalf of the defendant by the defendant"s learned counsel the suit was

already heard on several days, namely 11 December, 2006, 18 December, 2006, 15th January, 2007, 20th February, 2007, 14th March, 2008,

28th March, 2007, 4th April, 2007 and 5th April, 2007, as an undefended suit.

2. It should, however, be mentioned here that the plaintiff was allowed to proceed with the suit treating it to be an undefended suit as I was

satisfied on the basis of the records of the proceeding regarding the due service of writ of summons upon the defendant including the necessary

certificates issued by the Registrar, Original Side and by the Sheriffs Office.

3. It is an admitted position however that when the learned counsel appeared on behalf of the defendant on 16th April, 2007 and made the above

prayer the defendant did not even enter appearance to contest the suit. It was submitted on behalf of the defendant that the defendant was unable

to contest the suit as no writ of summons was ever served upon the defendant and as such the defendant was not in the know that the above suit

was instituted by the plaintiff in this Court and the same was being heard as an undefended suit.

4. However, after considering the submissions of the learned counsel both for the plaintiff and the defendant, I adjourned the suit till 25th April

2007 and in the mean time learned advocate-on-record of the defendant was given liberty to inspect the records of the suit proceeding except the

depositions of the plaintiff and his witness/witnesses, who had already given evidence in Court by then, upon notice to the learned advocate-on-

record of the plaintiff and in the presence of an officer of this Court.

5. The defendant thereafter made an application essentially for a direction upon the plaintiff that the plaintiff should serve the writ of summons

together with the copy of the plaint filed in the suit upon the defendant, that the defendant be granted leave to enter appearance and thereafter file

written statement within a specified time after the service of writ of summons upon the defendant and stay of hearing of the suit as an undefended

suit. The full prayers, however, are set out in the defendant''s above application at pages 13, 14 and 15 thereof, G. A. No. 1297 of 2007. Since

the plaintiff wanted to contest the above application of the defendant, direction was given for using affidavits for final disposal of the defendant''s

application on merits.

6. The defendant, who is the only defendant as aforesaid, has primarily based her case only on one ground for obtaining leave of this Court to enter

appearance for contesting the suit by filing a written statement, that since no writ of summons or copy of the plaint was received by the defendant

the defendant was unable to enter appearance and consequently file the written statement to contest the suit. (Paragraph 23 of the petition).

7. It is an admitted position however that in this case the service of writ of summons upon the defendant was sought to be effected by two modes,

namely delivery of summons by Court and issue of summons for service by post in addition to personal service.

8. It was, however, rightly pointed out by the learned counsel for the plaintiff that simultaneous issue of summons of service by post in addition to

personal service ""is no longer required"" in view of the amendment of the CPC with effect from 2002, to be precise from 1st July, 2002, as by

virtue of such amendment, Rule 19(a) of Order 5 of the CPC (CPC, in short) was omitted altogether. Before the said rule was omitted a

simultaneous issue of summons for service by post in addition to personal service was generally regarded as necessary though Court could

dispense with such simultaneous issue of summons for service if the Court considered such service unnecessary. The effect of the 2002 amendment

or rather the effect of deletion of Rule 19(a) of Order 5 of CPC on the present case is that if the plaintiff is in a position to satisfy the Court that the

writ of summons was duly served upon the defendant through Court or rather by the process server of the Court in question, then and in that event,

the proof of service of writ of summons by post upon the defendant would no longer be treated to be necessary.

9. In the instant case, however, as far as the records of the proceeding show both modes were used for service of writ of summons upon the

defendant, one through the process server of the District Court of Alipore since the place of residence of the defendant was (is) outside the original

jurisdiction of this Court and also by registered post.

10.1 would first examine the relevant averments made by the petitioner, namely the defendant in her petition in support of her case that no writ of

summons or copy of the plaint was received by the defendant.

11. In order to demonstrate that no writ of summons or the copy of the plaint was received by the defendant, the contents of the report dated

22nd December, 2005 of the process server have been relied on. The defendant has tried to show that according to the process server''s report he

went to the 4th floor (Panch Tala in Bengali) at premises No. 49/65, Gulam Muhammad Shah Road, Calcutta - 700 033 on 25th December,

2005 and affixed copy of the writ of summons and the plaint on the outer door of a room on the 4th floor (Panch Tala in Bengali) of the said

premises. (Subparagraph VI of Paragraph 16 at page 8 of the petition).

12. According to the defendant, since 1999 ""the defendant has been living and still is residing with her father in the flat on the third floor of premises

No. 49/65, Gulam Muhammad Shah Road, Calcutta - 700 033. The said premises.....is a four storied building"". [Paragraph 17 at Page 9 of

the petition).

13. There is no denial, however, that the premises number mentioned in the report, which I would also call a declaration, is the residential premises

of the defendant. The defendant has also said that the same is a four storied building but the defendant ""has never met any process server"".

Paragraph 17 of the petition].

14. The defendant has categorically stated that the defendant had not received the writ of summons or a copy of the plaint ""relating to the suit being

C. S. No. 223 of 2005 and as a result thereof the defendant could not enter appearance and file the written statement to defend the suit ""by

engaging lawyer when the said suit was heard by this"" Court. (Paragraph 23 of the petition).

15. Since no writ of summons has been received by the defendant, the defendant should be given leave to enter appearance and file the written-

statement for the purpose of contesting the suit within a specified time after the due service of the writ of summons upon the defendant with a copy

of the plaint filed in the suit.

16. Admittedly, the plaintiff instituted, the suit in this Court and since the defendant was(is) residing outside the ordinary original jurisdiction of this

Court the writ of summons was sent to the District Court at Alipore (as the defendant was(is) residing within the jurisdiction of that Court for

delivery of writ of summons to the defendant and that is why it is the process server of the District Court of Alipore who had to serve the writ of

summons upon the defendant as provided in the relevant provisions of the Code of Civil Procedure, namely sub-rule 4 of Rule 9 of Order 5

thereof and the relevant provisions under chapter 8 of the Original Side Rules.

17. In support of due service of the writ of summons upon the defendant by both the modes, as aforesaid, the plaintiff has annexed the relevant

documents to the affidavit-in-opposition used by the plaintiff to contest the present proceeding initiated by the defendant for the purpose of

obtaining-leave to enter appearance and to file the written statement.

18. For my present purpose, as I would first deal with the service of writ of summons by the process server, the original report of the process

server, Chunilal Sardar, dated 22nd December, 2005 as appearing in the writ of summons and the certificate issued by Sovan Das, Dealing

Assistant of the Sheriffs Office of this Court dated 6th March, 2006, need I think be examined once again. In addition to that the plaintiff, needless

to mention, also had relied on the certificate issued on behalf of the Registrar, Original Side dated 13th November, 2006 certifying that the

defendant ""has not entered appearance either in person or by Advocate up to 10th November, 2005"".

19. At this juncture, I must say that when I allowed the plaintiff to prove his claims made in his suit ex parte treating the suit to be an undefended

suit, I was fully satisfied with the due service of the writ of summons upon the, defendant and this satisfaction on my part was based on the above

documents relied upon by the plaintiff or rather on his behalf by his learned counsel at the hearing of the suit, copies whereof have also been

annexed to the present affidavit-in-opposition. However, as the hearing of the present proceeding was initiated by the defendant on the basis of the

leave granted by me I decided to give the defendant a chance to prove the defendant''s case as made out in the petition that the defendant was

unable to appear on the day when the suit was fixed for hearing as the writ of summons of the suit was not delivered to the defendant, or rather,

more appropriately, the defendant had not received the writ of summons nor a copy of the plaint which prevented the defendant from entering

appearance and filing the written statement to contest the suit. (Paragraph 23 of the petition).

20. It must be made clear at this stage also that since the plaintiff was allowed to prove his claims made in the suit ex parte it was not for the

plaintiff to prove due service of summons upon the defendant all over again either by the delivery of writ of summons by Court or by mail or post

as provided in the CPC and in the High Court Rules. The plaintiff, as aforesaid, was allowed to proceed with the suit ex parte as I was fully

satisfied with the due service of writ of summons upon the defendant after the institution of the suit. Even then, keeping in view the provisions of

Rule 19 of Order 5 of CPC and more importantly the statements made by the defendant that ""the contents of the report of the process server

should not be taken to be correct without giving"" the defendant an opportunity to cross-examine, the process server through her advocate,

(Paragraph 16 Page 10 of the affidavit-in-reply), I made the order on 29th April, 2008 whereby the concerned process server, namely Chunilal

Sardar, an employee of the District Court of Alipore, was summoned by me to give evidence in Court as I thought that his evidence was necessary

for an effective adjudication of the present proceeding, meaning thereby the proceeding initiated by the defendant with the leave of this Court for

obtaining leave to enter appearance and file the written statement for the purpose of contesting the suit.

21. The plaintiff, I repeat, had discharged his initial burden of proving due service of writ of summons upon the defendant on the basis of the above

mentioned documents including the necessary certificates before being allowed to prove his claims in the suit ex parte by me.

22. Since in the present proceeding the defendant has stated that she was not served with the writ of summons, or rather, had not received the writ

of summons which prevented her from entering appearance for the purpose of contesting the suit, the onus is on the defendant to prove that she

was not, in fact served with the writ of summons as claimed by the plaintiff, or rather, the officials of this Court and the Court of Alipore as the

alleged non-service or non-receipt of writ of summons upon or by the defendant gave the defendant her cause of action for the present proceeding

for obtaining leave to enter appearance and file the written statement. The defendant, therefore, must discharge the onus of proving that there was

no service of writ of summons upon her as claimed by the plaintiff together with the concerned departments of this Court including the process

server of the District Court. The plaintiff is under no obligation to prove due service of writ of summons upon the defendant repeatedly or all over

again since the plaintiff was allowed to proceed with the suit by this Court as this Court was satisfied with the due service of the writ of summons

upon the defendant in the first place.

23. Pursuant to my above order, the process server, the said Chunilal Sardar, an employee of the District Court of Alipore, was examined before

me on 14th May, 2008 and he was also thoroughly cross-examined by the defendant''s counsel on 3rd June, 2008. The process server gave

evidence that he was working as a process server for nearly 40 years, 38 years to be precise. and never in the past he was summoned by any

Court to give evidence on due service of writ of summons upon the parties in any matter and this was the first time that he was summoned to give

evidence in Court. The process server has indeed an unblemished record of nearly forty years. His appearance, the age and experience are, I have

found, very convincing as well.

24. The process server in his evidence from the witness box stated in clear terms that he visited the premises in question on 22nd December, 2005

at about 2 p.m. when he was told by a person who came out from the building to go on to the top floor of the said premises, or rather, of the

building in question at the premises as the defendant, the process server was told by that person, was to be found on the top floor, namely the 4th

floor which, in Bengali, he said ""Panch Tala"". When he knocked the door of the fiat in question ""two ladies came out along with two dogs who

were barking at"" him. The ladies opened the door but the collapsible gate of the flat remained closed. The process server was asked by the ladies

the purpose of his visit, when he explained as to why he was visiting the place. The process server also mentioned the name of the defendant or

rather called the defendant by name and said that he came to deliver the writ of summons to the defendant but the ladies refused to accept the

same. The process server then tied the summons with the collapsible gate and as he was climbing down the stairs the collapsible gate was opened

and two dogs who were little behind the two ladies came running after the process server but the process server somehow escaped. One of the

two ladies who came out in fact said that she was the defendant. The process server also approached the person who showed him the way to the

top floor but the person did not keep the request of the process server to sign on the document i.e. the writ of summons ""as that person did not

want to sign any Court''s document"". On being asked in examination-in-chief why did the process server mention in his report that he went to the

4th floor whereas the flat in question was, in fact on the third floor, he said that he described it to be 4th floor as the person who showed him the

way said that it was ""Panch Tala"" so the process server went to the top floor and found the same to be the roof of the building. He then came

down to the next floor and knocked the door when the two ladies came out to answer, I specifically asked the process server whether he first

went to the rooftop and then came down, his answer was ""yes"", then he said that he came down to the very next floor. When I asked the process

server when he reached the roof top what he found, he said that he did not find any other floor on the roof. [Questions 19 to 26 in Examination-in-

Chief|.

25. In his cross-examination the process server, I find, clearly repeated what he stated in his report dated 12th December, 2005, which I take it to

be his declaration as well. He also said the person who showed him the way to the roof top at the premises in question, in fact, came out from the

house in question when he ""called but the person did not disclose his name, or rather, his identity"". He also mentioned that one of the two ladies

who came out from the flat in question did say that she was the defendant but both of them refused to put their signatures on the documents. In

cross-examination, he explained the whole thing in detail as to how he went to the roof top and then came down to the next floor and then

knocked the door when two ladies came out, one of whom said that she was the defendant and then refused to put any signature on the documents

then the process server ""tied the writ of summons with the collapsible gate with thread"". In answer to specific questions put by the defendant''s

counsel, namely questions 60 and 61 he explained how he served the writ of summons To Counsel:

The expression ""latkaya dia jari karilam"" in your report written in Bengali what did you mean by that expression?/By hanging with thread. What did

you hang with the thread?/The true copy of the writ of summons was hanged with thread by me.

26. When the defendant''s Counsel asserted that there was no collapsible gate in front of the door of the flat in question, he said that there was a

collapsible gate as well as the door of the flat.

27. In his entire evidence, which I have examined more than once, the process server stated in clearest possible terms as to how he served or

delivered the writ of summons to the defendant (who is the only defendant in the suit).

28. His evidence in Court, I find, tallies exactly with his report, or rather corroborates his report or the declaration made by him on 22nd

December, 2005 after the process server completed his service of writ of summons.

29. Taking an extremely technical approach, learned counsel on behalf of the defendant was trying to make out a case that though the process

server mentioned in his report that he served the writ of summons, he did not say that he also served the copy of the plaint. If the evidence is

analyzed, which I have done very closely and repeatedly, it would be seen that the only question that was put to the witness, namely the process

server by the defendant''s counsel was that he did not serve the writ of summons to which he repeatedly answered that he did serve the writ of

summons. Why the defendant''s counsel was so shy to suggest the process server that he ""neither served the writ of summons, nor a copy of the

plaint,"" when the case that the defendant has tried to make out in the petition is that the defendant did not receive the copy of the writ of summons

nor a copy of the plaint, cannot however be understood with any rational approach.

30. It should be mentioned at this stage, however, that the suit was instituted in this Court and the concerned department of this Court sent the writ

of summons together with the copy of the plaint, as it is done regularly as a matter of course in every suit, to the concerned District Court for the

purpose of delivering the writ of summons to the defendant concerned as the defendant admittedly was residing outside the original jurisdiction of

this Court. In this connection, it will be enough to mention the question put to the process server by the defendant''s counsel, namely question 71 -

I put it to you that no writ of summons was served by you on the defendant"" to which his answer was rather specific, he said, ""I went there, I

showed her the document, she read it, thereafter she refused to accept it, then I hanged the copy of the writ of summons with the collapsible gate

with a thread"".

31. Then in answer to question 72 which happened to be the last question in cross-examination, namely, ""I put it to you that the contents of your

report dated 22nd December, 2005 are not correct"", the process server answered in the positive saying that ""it is correct and my report was right"".

32. As I have said above that the process server gave the correct a perfect answer to the suggestion made by the defendant''s counsel i.e. question

71 as it was not put to him at the same time that he neither served the writ of summons nor the copy of the plaint upon the defendant on 22nd

December, 2005.

33. In his connection, I shall deal with the judgment of the Supreme Court, relied upon by the defendant''s counsel a little later, before that, I must

also point out that the process server came and gave evidence in support of his report or the declaration dated 22nd December, 2005 regarding

his service of writ of summons upon the defendant. He made positive statements from the witness box in his evidence which I find no reason to

disbelieve, on the contrary, in the absence of any better evidence from the defendant, I believe and accept the evidence of the process server and

his report or declaration on the due service of the writ of summons together with the copy of the plaint upon the defendant. It may well be, that the

defendant''s counsel did not deliberately ask the process server whether he served the copy of the plaint together with the written statement

because the answer was expected to be so obvious.

34. Above all, I find it extremely difficult to appreciate as to why the. defendant did not come forward and give evidence to substantiate her case

made in the petition. As I said above, in order to proceed with the suit the plaintiff had to satisfy this Court, which the plaintiff did, that after the

institution of the suit the writ of summons was duly served upon the defendant and in spite of such service the defendant did not enter appearance

and as such the plaintiff had a right to proceed ex parte and the Court on that basis should allow the plaintiff to proceed ex parte treating the suit to

be an undefended one.

35. Since the defendant has attempted to set up a case that the defendant did not receive the writ of summons or the copy of the plaint or that

there was no proper service of writ of summons either by the process server or by the registered mail the onus is on the defendant to prove that the

service that was alleged to have been effected upon the defendant either by the Court through its process server or by the registered mail was not

in fact a true service in the first place.

36. In this connection, the decision of the Supreme Court relied upon by the defendant''s counsel, namely Sushil Kr. Sabharwal v. Gurpreet Singh

& Ors., reported in AIR 2002 SC 2370, is referred to. In that case the appellant before the Supreme Court was trying to establish that since the

service of writ of summons was sought to be effected upon the defendant just a day before the date of hearing of the suit and that the process

server concerned did neither affix a copy of the summons nor the plaint on the wall of the premises in question and since the alleged affixation of

the writ of summons was not witnessed by any person who could identify the defendant, the so-called service of writ of summons should be

treated to be ""non-service of summons"" and that should be held to be a good ground for setting aside an ex parte decree. The High Court in that

case, in fact, refused to set aside the ex parte decree without satisfying itself as to the due service of the writ of summons, the Supreme Court

found.

37. The facts of that case undoubtedly differ substantially from the facts of this case so far as the service of writ of summons upon the defendant in

the present case is concerned. However, the Supreme Court after examining the facts as to how the writ of summons was sought to be served

upon the defendant concerned was satisfied that there was no proper service of writ of summons upon the concerned defendant as the

endorsement made by the process server was contradictory. The Supreme Court said in paragraph 8 at page 2371 of the report:

We find several infirmities and lapses on the part of the process server Firstly, on the alleged refusal by the defendant either he did not affix a copy

of the summons and the plaint on the wall of the shop or if he claims to have done so, then the endorsement made by him on the back of the

summons does not support him, rather contradicts him. Secondly, the tendering of the summons, its refusal and affixation of the summons and copy

of the plaint on the wall should have been witnessed by persons who identified the defendant and his shop and witnessed such procedure. The

endorsement shows that there were no witnesses available on the spot. The correctness of such endorsement is difficult to believe even prima/arte.

The tenant runs a shoe shop in the suit premises. Apparently, the shop will be situated in a locality where there are other shops and houses. One

can understand refusal by unwilling persons requested by the process server to witness the proceedings and be a party to the procedure of the

service of summons but to say that there were "no witnesses available on the spot is a statement which can be accepted only with a pinch of salt.

Incidentally, we may state that though the date of appearance was 23rd February, 1993, the summons is said to have been tendered on 22nd

February, 1993, i.e. just a day before the date of hearing.

38. But the decision of the Supreme Court, I think, was based on the evidence of the appellant himself, namely the defendant the suit, who

complained that there was no proper service of the writ of summons upon him in the first place and gave evidence to that effect in Court, as the

Supreme Court said --

The appellant has himself appeared in the witness-box and deposed on oath that no summons was tendered to him by any process server of the

Court. It is a case of oath against oath. In view of the facts which we have noticed hereinabove clearly the oath of the appellant was more weighty

than the oath of the process server. In the ordinary course of events, the Court of facts should have discarded the statement of the process server

and believed the statement of the appellant"". (See Paragraph 9 at Page 2372 of the report).

39. In my opinion, the evidence given by the appellant/ tenant from the witness-box was the deciding factor as the Supreme Court accepted the

evidence of the appellant/tenant given from the witness box to be the better evidence than the evidence of the process server in that case. The

Supreme Court undoubtedly was dealing with a case of the defendant/appellant who was seeking an order of setting aside the ex parte decree

against him. The Supreme Court on facts was satisfied that the defendant had no notice of the date of hearing and that the case before the Supreme

Court was not a mere irregularity in the service of writ of summons but it was a case of non-service of writ of summons and the appellant, namely

the defendant by his evidence from the witness-box could prove that there was no due service of writ of summons upon him in the first place.

40. Most importantly, however, the defendant in her petition has not questioned the correctness of the process server''s visit to the defendant''s

residence for the purpose of service of the writ of summons on 22nd December, 2005 at all. The defendant has made only one line statement that

the ""petitioner has not met any process server"", and in the affidavit-in-reply the defendant, I repeat, has said ""that the contents of the report of the

process serve should-not be taken to be correct without giving"" the defendant ""an opportunity to cross-examine the process server should not be

taken to be correct without giving"" the defendant ""an opportunity to cross-examine the process server through"" her ""advocate"". (Paragraph 16 at

Page 10 of the affidavit-in-reply).

41. In the present case, however, it is only the one sided evidence of the process server in support of the service of writ of summons upon the

defendant which I have examined very closely and repeatedly and found to be good evidence of due service of the writ of summons upon the

defendant. No challenge has been thrown to the positive statements made by the process server in support of his report from the witness-box. The

process server also stated that the person who showed him the way to the defendant''s flat refused to put his signature on the writ of summons

since he was not willing to given ""any Court''s paper"".

42. As the truth has the bad habit of coming out any way, the proses corver from the witness-box said that not only two ladies appeared behind

the collapsible gate but there were two dogs as well with them who were barking at him. A process server cannot have the special knowledge of

pet dogs unless he had gone to the premises, or rather, to the flat in question to deliver the writ of summons, how the process server could go on

asserting that there were two dogs who, in fact, chased him and he somehow escaped. True it is, that he did not mention this incident in the report

as he said that there were several difficulties faced by a process server every day in effecting service of writ of summons to different parties. In

other words, what he wanted to say was that this was one of the usual hazards faced by a process server in discharging his duties very often and

that is why these things are not normally mentioned in the reports.

43. Interestingly enough, however, the defendant did not challenge this positive assertion on the part of the process server that there could not be

any presence of dogs at the defendant''s premises or rather at the flat in question as the defendant or her family never had any ""pet dogs"" in the first

place or that the dogs did not belong to the defendant or her family or that the evidence on dogs was false or untrue ""for some reason or the other"".

No challenge on this assertion was thrown to the process server in cross-examination by the defendant''s learned counsel except that the process

server did not mention this incident in the report, to which the process server, answered and answered quite honestly, that these things are not

mentioned by a process server as there are many hazards like this, which a process server has to face in discharging his duties practically everyday.

44. However, the evidence of the process server from the witness-box that he was chased by the dogs is rather too serious. By allowing the dogs

to chase the process server at the time when he was discharging his duties or acting under the authority of ""Court"", the defendant and the other lady

(her companion), in my opinion, have also rendered themselves liable for committing criminal contempt.

45. I repeat that the process server''s evidence has remained uncontroverted and the defendant even by cross -examining the process server to the

fullest extent has not been able to throw any doubt on the due service of the writ of summons upon the defendant at all.

46. I also accept the case of the plaintiff that since the defendant has said that there has not been any service of writ of summons, or rather any

service of writ of summons in the first place, the question whether the copy of the plaint was served or not becomes immaterial as it is not the case

of the defendant that ""even assuming the copy of the writ of summons was served, but there was no service of copy of the plaint upon her at all.

The case of the defendant in the petition is that the defendant did not receive the writ of summons nor the copy of the plaint. The defendant has

also said that the defendant did not meet any process server.

47. The defendant however, I believe, knew full well that merely the allegation of non-service of copy of the plaint upon the defendant would not

take the case of the defendant too far as far as the present proceeding is concerned and that is why the petition proceeds on the basis that no writ

of summons was served upon the defendant. The defendant has not said that since ""I was not served with the copy of the plaint I could not file the

written statement"" her ease is, as aforesaid, she did not receive the writ of summons nor the copy of the plaint and that is why the defendant could

not enter appearance to contest the suit by filing her written statement.

48. I, therefore, do not attach any importance to the faint and feeble attempt on the part of, or rather on behalf of the defendant to suggest that the

report or the declaration of the process server and his evidence from the witness-box do not prove that a copy of the plaint was also served upon

the defendant with the writ of summons. Even if the defendant were duly served with the writ of summons without the copy of the plaint, then it

would be obligatory on the part of the defendant to enter appearance to contest, the suit and then apply for a direction for service of the copy of

the plaint to enable the defendant to file the written statement.

49. In this connection the decision relied upon on behalf of the defendant. namely Nahar Enterprises Vs. Hyderabad Allwyn Ltd. and Another,

does not take the case of the defendant anywhere, as in that case the writ of summons was admittedly served upon the defendant alter the datfixed

for his appearance and that is why the Supreme Court said that it was obligatory on the part of the Court, or rather the trial Court to fix another

date for hearing for the defendant''s appearance and for filing of the written statement and as such the trial Court should have directed that as the

writ of summons was admittedly served after the date fixed for his appearance in the summons, a fresh writ of summons should be served upon the

defendant. A plain reading of paragraphs 4 and 10 at pages 467 and 468 of the report makes the above position absolutely clear.

50. The Supreme Court in that case found that in the summons sent to the appellant, a particular date, namely 10.10.1988 was fixed for his

appearance but since the -writ of summons had not been served upon the defendant the Court had to adjourn the matter till 02.12.1988. But the

writ of summons was, in fact, served on the appellant on 14th October 1988 after the expiry of the date of appearance of the defendant, namely

10.10.1988 mentioned in the summons. The defendant was diligent enough to inform the Trial Court by his telegram and his letter that although he

received a writ of summons after the expiry of the date of his appearance mentioned in the same, he did not receive any copy of the plaint along

with the writ of summons. The said telegram or the letter of the defendant was not even replied to. The Court did not issue any further summons

fixing another date for his appearance but since on the adjourned date the appellant/defendant was absent the Court fixed another date for ex parte

hearing and on the adjourned date the suit was decreed ex parte.

51. It is on that issue the Supreme Court observed that then (sic) manifest error on the part of the learned Trial Court as it failed to take into

consideration that the summons having been served upon the appellant after the date fixed for his appearance it was obligatory on the part of the

Court the fix another date for his appearance and for filing a written statement and as such the trial Court should have directed the plaintiff to take

steps for fresh service of writ of summons and this the Supreme Court said ""is expert (sic) view of provisions of Order 9 Rule 6(1)(c) of the CPC"".

(See Paragraph 10 at Page 468 of the Report).

52. I do not think I need to say more as to why I think that the above two Supreme Court decisions do not come in aid of the case of the

defendant which the defendant has attempted to make out in her petition for obtaining leave to enter appearance and for filing the written statement

for the purpose of contesting the suit. On the contrary, both the above decisions in fact make the feeble attempt on the part of the defendant to

somehow make out a case of ""non-service or non-receipt of the writ of summons"" even weaker.

53. Now comes the question as to whether the defendant was duly served with the writ of summons by mail, or rather by registered post. At the

very outset it must be said that learned counsel on behalf of the plaintiff has rightly argued that by virtue of Rule 19(a) of Order 5 of CPC which

was brought about by way of amendment of the Code with effect from 1st July, 2002 the simultaneous issue of writ of summons for service by

post in addition to personal service has lost its importance as the service by anyone of the modes, namely the personal service or the service of writ

of summons by post will suffice.

54. However, since I am fully satisfied that the writ of summons together with the copy of the plaint was duly served upon the defendant by the

process server on 22nd December, 2005, my attempt to examine whether the defendant was also duly served with the writ of practically be

academic.

55. In support of the service of writ of summons by post an affidavit of Sri Amar Kr. Sengupta, ""an assistant in the Sheriffs Office, High Court at

Calcutta"", affirmed on 29th March, 2006 and the receipt acknowledging that the writ of summons with a copy of the plaint was delivered to the

premises in question and received by one Gopal Roy (Gopal, in short) on behalf of the defendant was and is relied upon. The said

acknowledgement receipt was signed by Gopal who was admittedly the driver of the father of the defendant at the time when the writ of summons

was delivered to the residence of the defendant by the postman and received by Gopal, the driver. However, the defendant has said that Gopal

never informed the defendant or her father or mother or any other family member of the father of the defendant that he received any copy of the

writ of summons or the plaint filed in the suit, nor Gopal had handed over the copy of the writ of summons or the plaint in question to the defendant

or her mother or her father or anybody else in the family. Gopal is not a member of the family and that the defendant had never authorised or

empowered Gopal to accept any writ of summons or copy of the plaint or any other paper or document relating to any ""Court proceedings"".

(Paragraphs 18, 19, 20, 22 of the defendant''s petition).

56. On a plain reading of the petition of the defendant it is clear that the father of the defendant plays a very important role in her life and that the

defendant has the fullest faith and confidence in her father who also looks after the Courts'' proceedings on behalf of the defendant. Admittedly, at

the relevant point of time Gopal was employed as the driver of the father. It is not the case of the defendant that the father of the defendant or the

defendant had no confidence in Gopal, the driver, otherwise how could he be trusted as the driver of the father of the defendant. Unless the

employer or the owner of the car, namely the father of the defendant, had the fullest faith in the person who was employed as his driver, he would

not have been retained as ""driver"". As far as the question of authority is concerned the onus was on the defendant to prove that Gopal, the driver

had no authority to accept or was not empowered to accept the copy of the writ of summons from the postman who went to the defendant''s place

to deliver the same.

57. The writ of summons together with the copy of the plaint was, no doubt mailed to the correct address, namely the premises of the defendant. It

was also received by a person who held as important position as the driver of the defendant''s father with whom the defendant was living or

perhaps is still living as well. The father of the defendant, as aforesaid, has a very important role to play, if not the most important role to play as far

as the Courts'' proceedings in which the defendant has interest are concerned as evident from the statements of the defendant made in paragraphs

1 to 18 of the petition.

58. I do not know why the defendant did not even make any attempt to produce the driver as witness or why did not the defendant herself come

forward and say that she did not receive any copy of the writ of summons or the copy of the plaint from Gopal, the driver. At no point of time the

defendant was ready to examine Gopal as well. The presumption of due service of writ of summons together with the copy of the plaint by

registered post is, in my view, overwhelmingly in favour of such service on the basis of the documents evidencing such service.

59. I see no reason to hold that the service by registered post is improper service in the facts and circumstances of this case. I also accept the

submissions on the basis of section 114 (e) of the Indian Evidence Act as well as section 3(e) of the Indian Post Office Act 1898 made by the

learned counsel of the plaintiff. Section 3(e) of the 1898 Act contains the meaning of the expression - ""in the course of transmission by post"" and

delivery"". Section 3 (e)(c) says that ""the delivery of postal article at the house or office of the addressee, or to the addressee or his servant or

agent or other person considered to be authorized to receive the article according to the usual manner of delivering postal articles to the addressee,

shall be, deemed to be delivering to the addressee"". In this case the postman rightly considered Gopal, the driver to be authorized to receive the

writ of summons for and on behalf of the defendant.

60. The presumption, as aforesaid, u/s 1 14(e) of the Indian Evidence Act, in the present case, as rightly submitted by the plaintiffs learned

Counsel, is that ""the postman had duly served on the person who could he served in the regular course and in due discharge of his duties"".

61. As rightly contended by the defendant''s learned counsel that the presumption u/s 27 of the General Clauses Act and u/s 114(e) of the Indian

Evidence Act, 1872 is rebuttable, but I am afraid that in the facts and circumstances of the case and, the evidence on record the defendant has

miserably failed to rebut that presumption. On the contrary the defendant has tried to take an extremely technical, or rather, hypertechnical

approach to make out a case that no writ of summons was served upon the defendant. In order to show that the driver of the defendant''s father

had no authority to accept the service of writ of summons by post, it was pointed out that a servant is not regarded as a member of the family

within the meaning of rule 15 of order 5 of the Code of Civil Procedure. Indeed, nobody suggests that a driver is to be regarded as the member of

the family of his employer, the question is whether the driver or the servant is authorized or empowered to accept the delivery of the writ of

summons or the documents regarding Courts'' proceedings.

62. I have already said that the driver of the father of the defendant was employed as the driver as the father of the defendant and his family

members including the defendant being the daughter had the full confidence in the person concerned, namely Gopal, otherwise he could not be

retained in the service as driver of the family or driver of the father of the defendant. The relationship, as I have already said, between the

defendant and the father has been very close and the defendant with her daughter has been living with her father and mother as the members of the

family of the father since 1999 as evident from the statements made in the petition itself by the defendant.

63. I repeat that the defendant has made no attempt to show that the driver of the defendant''s father had no authority to accept the writ of

summons by post on her behalf. She has done nothing to rebut the presumption, as aforesaid. The defendant could have easily come forward to

give evidence to demonstrate that the driver had no authority and could have also asked for the driver''s presence in Court for examining him.

64. The feeble attempt on behalf of the defendant to show that Gopal had no authority or was not empowered to accept the delivery of the writ of

summons from the postman and for such purpose reliance on the unreported judgment of this Court on in application for revocation of the grant of

probate by this Court in the goods of Bhagawati Prasad Chowdhury, G. A. No. 1803 in PLA No. 28 of 2002, is nothing but an exercise in futility.

65. In the above case, on facts it was found that there was no proof ""that the citation was received either by the petitioner or by some other

persons said to be Darwan of the house and also another person who were authorized by him"". (See Page 6, the 2nd Paragraph of the judgment.)

66. The learned Judge thought that ""the propounder executor could have come with the affidavit of the Darwan, who was the ""common Darwan

of the petitioner as well as the propounder, as the common Darwan allegedly received the citation. Since no such affidavit of the common Darwan

was on record acknowledging due service of citation the learned Judge was not prepared to accept the service of citation as due service in the

facts of that case and that is why it was said that the executor propounder had failed to discharge the burden as he failed to produce any counter

affidavit, of the common Darwan, or ""any other person that it was received by him and the same was handed over to the petitioner"". (See the 1st.

2nd paragraphs at page 6 of the Judgment).

67. The driver in the present case (if he is not still the driver) was the driver of the defendant''s father, and 1 have already explained why I think that

the defendant''s father and the family members of the defendant incharge the defendant herself should be taken to have the full confidence in Gopal,

the driver, as otherwise he could not have served the family as driver. It is common knowledge that a person who engages another as his driver

must have the fullest confidence in the person as without such confidence an important job such as of a driver cannot be entrusted with a person by

the employer, the owner of a vehicle. Similarly, without the confidence of the family members of the owner of a car in the driver, the owner cannot

retain such driver.

68. Since in the facts and circumstances of the entire case and on repeates reading of the evidence on record I am convinced that the writ of

summons together with the copy of the plaint was duly served upon the defendant both by the process server and by registered post I do not think

I need to go on dealing with the cases cited in support of the plaintiffs case in detail. Sufficent it to say, however, that the decisions amongst others

in United Commercial Bank Vs. Mrs. Raka Sen (Nandi), , and in Basant Singh and Another Vs. Roman Catholic Mission, relied on by the

plaintiffs learned counsel fully support the stand of the plaintiff taken in his affidavit use it opposition regarding the due service of writ of summons

upon the defendant 11.

69. I must say at the end that I thoroughly disbelieve the case attempted to be made out in the petition by the defendant for obtaining leave to enter

appearance and file the written statement for contesting the suit instituted by the plaintiff against the sole defendant. Needless to mention, leave to

enter appearance for contesting a suit cannot be granted in this case to the defendant as a matter of course in the absence of a genuine non-

service-of writ of summons.

70. Since I have also the feeling that the attempt on the part of the defendant to obtain leave of this Court to enter appearance and to file wonder

statement for the purpose of defending the suit has not been an honest one inasmuch as the defendant has not really told the truth, instead has taken

a hypertechnical approach to demonstrate that the writ of summons was not served or delivered either by the process server or by registered post,

the defendant is liable to pay cost to the plaintiff assessed at 500 GMs which cost the defendant must pay by 11th November, 2008 to the plaintiff

of the plaintiffs advocate on record.

71. The application is thus dismissed with cost as above.

72. Let the suit appear as an undefended suit as before for further hearing on the second Wednesday, 12 November 2008 after the Puja Vacation

Let an urgent xerox certified copy of the judgment be given to the parties, if applied for. on the urgent basis.