Colgate Palmolive (India) Limited Vs Coastal Roadways Limited

G.A. No. 18 of 2011, A.P.O.T. No. 2 of 2011 and C.S. No. 96 of 1992

Court: Calcutta High Court

Date of Decision: Aug. 24, 2011

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Order 1 Rule 8, Order 5 Rule 19A, Order 9 Rule 5#Limitation Act, 1963 â€" Article 137

Hon'ble Judges: Sambuddha Chakrabarti, J; Bhaskar Bhattacharya, J

Bench: Division Bench

Advocate: Jishnu Chowdhury, Noelle Banerjee and S.N. Dutta, for the Appellant; Aniruddha Mitra, for the Respondent

Judgement

Bhaskar Bhattacharya, J.
This appeal is at the instance of a Plaintiff in a suit for recovery of money and is directed against order dated

15th December, 2010, passed by a learned Single Judge of this Court by which His Lordship allowed an application for recalling an earlier order

dated March 19, 2009, passed by another learned Single Judge of this Court who allowed the application for extension of time filed by the

Appellant by granting leave to issue fresh writ of summons and re-lodge the same within 14 days.

2. By the order impugned, the learned Single Judge after recalling the earlier order dated March 19, 2009 put back the parties to the earlier

position prevailing immediately preceding the said order and the result was that the application being G.A. No. 689 of 2009, which was allowed

by order dated March 19, 2009, was revived and the Defendant was granted opportunity to file affidavit to G.A. No. 689 of 2009 within a week

from that date. The learned Single Judge further held that the said application should be reheard on merit as the order dated March 19, 2009 was

passed without serving a copy of the application relating to G.A. No. 689 of 2009 upon the Defendant before extension of time to lodge writ of

summons.

3. Being dissatisfied, the Plaintiff has come up with the present appeal.

4. The facts leading to filing of this appeal may be summed up thus:

a) The Plaintiff/Appellant filed a suit claiming a decree for Rs. 14,98,220.62P. against the Defendant/Respondent in the year 1992. There is not

dispute that the writ of summons of the suit was lodged for issue and service in the office of the Sheriff on 28th February, 1992 and the Plaintiff had

put in the requisite fees for the same.

b) On 26th February, 2009, the said suit appeared in the daily cause list indicating that the same would be set down in the warning list of P.K.

Deb, J. on 5th March, 2009 in terms of Chapter X Rule 19 of the Original Side Rules (""Rules""). Immediately thereafter, by a letter dated 3rd

March, 2009, the Advocate-on-Record of the Plaintiff sought information from the office of the Sheriff about the service of writ of summons. In

reply, the Sheriff''s office by a report dated 4th March, 2009 informed that the writ of summons originally filed by the Plaintiff could not be served

upon the Defendant as after the completion of the procedural part in order to make the writ of summons ready, it was found that the returnable

date had expired. So the writ of summons could not be served upon Defendant due to shortage of time provided under Chapter VIII Rule 3A and

Rule 6 of the Rules. It was further stated in the said report that the duplicate copy of the original writ of summons had been misplaced and could

not be traced.

c) It may not be out of place to mention here that the fact of non-service of the writ of summons was never communicated to the Plaintiff or it''s

Advocate-on-Record by the department in the past and the Plaintiff or it''s learned Advocate-on-Record also, of their own, did not enquire

anything from the office.

d) Thereafter the Plaintiff took out an application being G.A. No. 689 of 2009 thereby praying for permission to issue fresh writ of summons and

re-lodging of the same. By an order dated March 19, 2009, P.K. Deb, J. was pleased to grant leave to issue fresh writ of summons and re-lodge

the same within 14 days. The Plaintiff caused fresh writ of summons to be issued and lodged within the time granted by the Court and

subsequently, the same was served upon the Defendant.

e) The Defendant entered appearance on 16th April, 2009 and filed an application being G.A. No. 1168 of 2009 on 24th April, 2009 thereby

praying for extension of time to file written statement. The said application being moved, the learned Master was pleased to grant time up to 8th

June, 2009 for filing written statement. However, No. written statement was filed within 8th June, 2009.

f) On 22nd June, 2009, the Defendant filed another application being G.A. No. 1670 of 2009 praying, inter alia, for recalling of the order dated

19th March, 2009 and for dismissal of the suit. As by that time, P.K. Deb, J. had retired, the matter was taken up by another learned Single Judge

taking interlocutory matters.

g) In course of hearing of the said application before the learned Single Judge, the Deputy Sheriff was examined on oath in open Court and the

Deputy Sheriff admitted that the original writ of summons was lodged in his office but the duplicate writ of summons was not available.

h) The learned Single Judge, as indicated earlier, allowed the said application filed by the Defendant by recalling the earlier order passed by P.K.

Deb, J. principally on the ground that No. notice of earlier application was served upon the Defendant before giving liberty to the Plaintiff to issue

fresh writ of summons.

i) Being dissatisfied, the Plaintiff has come up with the present appeal.

Mr. Mitra, the learned Advocate appearing on behalf of the Appellant, strenuously contended before us that there was No. error apparent on the

face of the record justifying recall of the earlier order of P.K. Deb, J. at the instance of the successor of His Lordship and the said order could be

challenged only by preferring an appeal before the Division Bench.

5. Secondly, the learned Advocate for the Appellant submitted that for the purpose of extension of time for fresh service of writ of summons in a

case where it was already lodged within the time prescribed by the Original Side Rules but the office could not issue the same for want of time due

to procedural irregularity at the instance of office, there was No. necessity of giving notice to the Defendant and thus, the learned Single Judge

acted illegally in recalling the earlier order passed by His Lordship"s predecessor.

6. Mr. Chowdhury, the learned Advocate appearing on behalf of the Defendant/Respondent, has, on the other hand, opposed the aforesaid

contentions of the learned Counsel for the Appellant and has contended that once No. step had been taken for re-issue of the writ of summons

within the time prescribed by the Rules, a valuable right accrued in favour of his client to have the suit dismissed. Therefore, before praying for

extension of time for re-issue of the summons, it was the duty of the Plaintiff to serve the copy of the application upon his client to contest the said

prayer of extension. Mr. Chowdhury submits that there being a mistake on the part of the Court while giving liberty to the Plaintiff to re-issue the

writ of summons, the learned Single Judge rightly corrected the earlier order. Mr. Chowdhury, has vehemently contended before us that it is the

duty of the Plaintiff or its learned Advocate-on-Record to constantly keep in touch with the office for ascertaining whether the original writ of

summons had been served or not and if it appears that the same could not be served, it was their obligation to immediately apply for issue of fresh

writ of summons. According to Mr. Chowdhury, the Plaintiff cannot wait for long 19 years without ascertaining whether the writ of summons

originally lodged was at all served or not. Lastly, Mr. Chowdhury contends that the period of limitation for filing an application for extension of time

is governed by Article 137 of the Limitation Act and the period starts running from the date when the writ originally filed could not be issued within

the returnable date and once the application had become time-barred, his client should get an opportunity to oppose the prayer of condonation of

delay. Mr. Chowdhury, thus, prays for dismissal of the appeal.

7. Therefore, the only question that arises for determination in this appeal is whether the order passed by the learned Single Judge recalling the

earlier order passed by His Lordship"s predecessor by which the said predecessor extended the time to file the fresh writ of summons can be said

to be justified.

8. In order to appreciate the question, the following dates are relevant:

4th February, 1992 Plaint presented before the Interlocutory Court and suit is instituted.

28th February, 1992 Writ of summons has been lodged with the Sheriff.

26th February, 2009 Peremptory Cause List of the Court indicated that the suit would be set down in the

warning list on 15th March, 2009.

3rd March, 2009 Mukherjee & Biswas, Advocates of the plaintiff requested the Sheriff of the Court for a

report with regard to the service of the writ of summons.

4th March, 2009 Sheriff of the Court issued a report recording that the returnable date of the writ of

summons was 24th

March, 1992 and in view of expiry of the returnable date, writ of summons could not be

served upon the defendant.

18th March, 2009 G.A. No. 689 of 2009 field for leave to issue fresh writ of summons and re-lodge the

same with the Sheriff and for extension of returnable date.

19th March, 2009 Order extending time to file writ of summons.

9. The provisions contained in Rules 3A, 6, 7 and 8 of Chapter VIII and Rule19 of Chapter X of the Original Side Rules are also relevant and

those are quoted below:

Chapter VIII

3A. Unless otherwise ordered, every Writ of summons shall be served as soon as practicable but not later than three weeks before the returnable

date thereof.

6. Summons to be delivered to the Sheriff within 14 days.-Except as hereinafter provided every writ of Summons shall be taken out and delivered

to the Sheriff, for service within the local limits of the jurisdiction of this Court, or for transmission for service elsewhere. A Writ of Summons * * *

shall have annexed thereto a copy of the plaint and of every document, sued on, a copy of which is filed therewith.

Unless an extension of time is obtained, it shall be taken out and delivered to the Sheriff within 14 days from the filing of the plaint or the date of the

order of amendment. Unless otherwise order, the writ of summons required to be served by registered post under the provision of Rule 19A of

order V of CPC shall be served in all cases by the Sheriff of Calcutta.

7. Sheriff not to receive summons after time.-Unless otherwise ordered, No. summons shall be received by the Sheriff for service or transmission,

after the expiration of the days mentioned in Rules 6 and 8.

8. Fresh summons, upon further amendment.- Where, upon the further amendment of any summons to appear and answer, the Registrar or

Master shall be of opinion that a fresh summons shall be prepared, and, upon payment of the usual fees, taken out, and, within 14 days from the

date of the order, delivered to the Sheriff for service.

Chapter X

19. Warning List.-A warning list of suit about to be transferred from the prospective list to the peremptory list of defended suits shall be prepared

for each Court for every working day. A warning list of suits about to be transferred to the peremptory list of undefended suits shall also be

prepared.

10. On a plain reading of the aforesaid provisions of the Original Side Rules, it appears that a duty is cast upon the Plaintiff to lodge the writ of

summons within the period of fourteen days from the presentation of the plaint and unless the said date is extended by the Master or the Court, the

office should not accept any writ of summons. The usual practice of the office is not to accept the writ of summons before the scrutiny of the plaint

is made by the Master and if in the process of scrutiny, fourteen days expire, the customary practice prevailing in this Court is that the Plaintiff

prays for extension of time before the Master who allows such prayer by endorsing on the writ of summons because the Plaintiff cannot be blamed

for the delay in making scrutiny of the plaint by the office.

11. In the case before us, the fact that the original writ of summons was accepted by the office would appear from the fact the office itself reported

that the original writ of summons could not be served within the returnable date. Thus, the fact that the initial step was taken by the Plaintiff has

been well established from the materials on record and Rule 7 of Chapter VIII makes it clear that the office could not otherwise than by a valid

order of extension accept the original writ of summons. In the case before us, the original writ of summons was not available and the office could

not find out the same. Since the office has admitted acceptance of the original writ of summons, in the absence of any evidence to the contrary we

should presume that the Plaintiff filed the same after getting the usual order of extension due to delay in scrutinizing the plaint, otherwise, the office

would not have accepted the same in violation of Rule 7 of Chapter VIII of the Original Side Rules. We, thus, find No. substance in the desperate

contention of Mr. Chowdhury that the Plaintiff even did not put in the original writ of summons within the time fixed by law which is based on No.

evidence.

12. Now it appears that the office did not place the matter before the Registrar or the Master or the court for an order of extension of the

returnable date or for direction upon the Plaintiff for re-lodging of a fresh writ of summons and consequently, there was No. communication to the

Plaintiff''s Advocate on record that the service could not be effected before the expiry of the returnable date fixed in the original writ of summons

and ultimately, long after 19 years, the matter appeared before the warning list when on enquiry by the learned Advocate on record of the Plaintiff,

it was disclosed by the office for the first time that the original writ of summons could not be served upon the Defendant for want of sufficient time

before the expiry of the returnable date originally fixed and immediately thereafter, the Plaintiff without waiting for an order from the Registrar or

the Master in terms of Rules 6 or 8 of Chapter VIII took step for fresh service by praying for extension of time before the Court and such prayer

was allowed by P.K. Dev, J.

13. After hearing the learned Counsel for the parties and after going through the materials on record, we are unable to accept the contention of Mr.

Chowdhury, the learned Counsel appearing on behalf of the Defendant, that a Plaintiff has a duty to enquire from the office as to the fate of the

original writ of summons. Once the original writ of summons has been put in but it could not be served for any reason, it is the duty of the office to

communicate the same by placing the matter in the list so that effective order can be passed either for amendment of the returnable date or for fresh

service. If in spite of such direction, the Plaintiff does not take step, the suit can be dismissed.

14. But in a given case where the Plaintiff has taken steps but the writ of summons could not be served for any reason, it is for the office to place

the matter in the list for the purpose of bringing such fact relating to non-service to the notice of the Plaintiff or his learned Advocate so that

effective order of amendment of the original writ of summons or fresh service can be passed in the presence of the learned Advocate for the

Plaintiff. The duty to take step for fresh service upon the Plaintiff or his learned Advocate arises from the date of order of the fresh service or order

of amendment of the returnable date originally fixed as it appears from Rules 8 and 6 of Chapter VIII of the Original Side Rules, as the case may

be, quoted earlier. The Master or the Registrar should after looking at the report of the office regarding service-report should form opinion as to

whether fresh service is required or not, or it is a case of good service, or a case of mere amendment of the returnable date fixed on the original

writ of summons, and to pass effective order to that effect.

15. In the case before us, the office did not take any step for long 19 years for placing a report to the Registrar or the Master pointing out that the

original writ of summons could not be issued before the returnable date and ultimately, when the matter appeared in the warning list the Plaintiff on

enquiry from the office came to know that the original writ of summons could not be served upon the Defendant and immediately thereafter, the

Plaintiff of its own prayed for permission to re-issue the writ of summons which was allowed by P.K. Deb, J. In this case No. order for fresh

service has been passed either by the Registrar or the Master or by the Court and as such, the liability to take step for such fresh service within 14

days never arose in term of Rules 6 or 8 in the absence of any order to that effect. It is really a case of issue of the original writ of summons with

the amended extended returnable date for issue upon the Defendant.

16. We also do not find any substance in the contention of Mr. Chowdhury that such prayer for extension of returnable date in substance can only

be granted upon notice to the Defendant.

17. In a suit, at the stage when the Defendant has not appeared, even if there is any default committed by the Plaintiff, such default can be

corrected by the Court on hearing the Plaintiff and being satisfied with the sufficient cause shown by the Plaintiff and without giving any notice to the

Defendant.

18. For instance, if a suit is dismissed on a day when the Plaintiff and Defendant were absent, notice of hearing of application for restoration of suit

need not be given to the Defendant and the Court can restore the suit after being satisfied by the Plaintiff that there was sufficient cause for his non-

appearance. However, after restoration, the Defendant is entitled to have a fresh notice of the day fixed for hearing. (See Jawar Prasad Shaw and

Ors. v. Jharna Ghosh and Ors. reported in 2005 AIHC 1466 (CALCUTTA) at paragraph 31) Similarly, if a suit is dismissed for not taking step

against the Defendant, the suit can be restored if the Plaintiff shows sufficient cause for not taking step and for revival of such suit there is No.

necessity of service of notice upon Defendant.

19. We, however, find substance in the contention of Mr. Chowdhury that once an application for restoration has become barred by limitation, for

reviving such application by way of condonation of delay, notice of such application must be given to the Defendant but so long an application has

not become time barred, the Defendant has No. right of hearing if the Defendant has not entered appearance in the suit or is himself absent on the

date of dismissal.

20. Therefore, the next question to consider is the period of limitation for filing an application for permission to re-issue a writ of summons which

retuned unserved for any reason.

21. In our opinion, the period of limitation for such an application will be governed by Article 137 of the Limitation Act and the period is 3 years

and time will start running when the right to apply first accrued. In the case before us, after the Original writ of summons could not be issued for the

want of time before the returnable day fixed for the fault of the office, No. further order for amendment of the original writ of summons for

extension of the returnable date for service having been passed in terms of Rules 6 or 8 of Chapter VIII of the Rules, the right to file an application

for extension of time beyond the time fixed by the Rules never accrued and before accrual of such right, the Plaintiff of its own prayed for extension

of returnable date for issuing writ of summons before the Court which was allowed by Deb, J. In this case, the matter appeared in the year, 2009

at the instance of the office in the warning list and immediately thereafter, the Plaintiff made prayer for service with extended returnable date and

such prayer was allowed. Thus, it was really not a case of ""re-issue"" of writ of summons when the original writ of summons never went out the

Sheriff''s office for service before the returnable date and therefore, the purported application for permission to re-issue the writ of summons was

not at all barred by limitation and accordingly, the Plaintiff was under No. obligation to give notice of the so-called application to re-issue the writ

of summons when the original could not be even issued from the office for service upon the Defendant for the delay committed by the office.

22. Therefore, the Plaintiff had No. liability to serve copy of the application upon the Defendant.

23. We, thus, find that the learned Single Judge erred in law in recalling the order passed by P.K. Deb, J. for the purpose of giving an opportunity

to the Defendant to oppose such prayer.

24. In the case before us, the Plaintiff has not committed any default in taking any step whatsoever under the Original Side Rules and it was the

office which did not place the matter before the Registrar or the Master for passing necessary order of amendment of the returnable date fixed in

the original writ of summons for service of the same and in fact, No. order was passed directing the Plaintiff to take step.

25. The next question is whether the Plaintiff or his learned Advocate after putting in the requisite writ of summons in the office for service upon the

Defendant has any further duty to enquire of his own for verification whether the same had returned unserved or not and to take step accordingly.

26. The learned Counsel for the parties could not place before us any of the provision of the Original Side Rules which casts a duty upon the

Plaintiff or his learned advocate-on-record to enquire from the office about the fate of the writ of summons originally deposited by him. If for any

reason, the original writ of summons is not served it is the duty of the office to place the matter before the Registrar or the Master in terms of Rule

8 of Chapter VIII of the Original Side Rules pointing out the defect in service and seeking necessary order or if the original writ of summons was

not issued from the office, it required amendment of the original writ of summons by amending the returnable date originally fixed and on being so

placed before the Registrar or the Master, the Plaintiff or his learned Advocate gets a notice of the defect in service from the office report and his

obligation to take step starts from the date of order passed by the Registrar or the Master in terms of Rules 6 or 8, as the case may be, mentioned

above.

27. It is impossible for an Advocate-on-Record to enquire about the fate of service of writ of summons which he has already put in for service

unless the matter appears in the list disclosing the fate of the original service.

28. We, therefore, hold that the Plaintiff or his learned Advocate-on-Record has No. duty to enquire from the office about the fate of service of

the original writ of summons.

29. We, thus, find that in the fact of the present case, the learned Single Judge erred in law in recalling the order passed by P.K. Deb, J.

notwithstanding the fact that there was No. error justifying recall of such order.

30. We now propose to deal with the decisions cited by Mr. Chowdhury.

31. In the case of Laxmi Trading v. Shriram Gobindnarain, reported in 61 CWN 212 a Division Bench of this Court was dealing with a case

where by reason of expiry of three months from the date on which of writ of summons was ""returned unserved"", the Plaintiff filed an application for

the issue of fresh summons which was dismissed by the Master. The Plaintiff preferred an appeal before the learned Single Judge which was

dismissed. In the said case, the writ of summons had returned unserved and the returnable date was 24th July, 1953 and the writ was returned on

13th February, 1954 with the usual endorsement that No. one on behalf of the Plaintiff attended at the Sheriff''s office to have the writ of summons

served on the Defendant. The Appellant caused an application to be prepared for issue of a fresh summons and affirmed the same on 14th May,

1954. The application, however, was not presented till the 17th May next, when the period of three months prescribed by Rule 5 of Order 9 had

already expired. The learned Master disposed of the application by saying that as it had been presented after the expiry of the time limit of three

months provided for in Order 9 Rule 5 of the Code, No. order could be passed on such application. The Appellant then presented petition before

a learned Single Judge by way of appeal from the order of the Master but such application was dismissed and against such decision the appeal was

filed without making the Defendant a party to the said appeal. In that context, the Division Bench cast doubt as to whether an appeal under the

Letters Patent was maintainable by the Plaintiff without making the Defendant a party. The Division Bench further held that No. step having been

taken by the Plaintiff within the time fixed by law as provided in Order 9 Rule 5 of the Code, the Master had No. other alternative but to record

dismissal of the suit and the learned Single Judge was justified in affirming the order of the Master. The case before us is, on the other hand, one

where due to fault on the part of the office, the writ of summons was not even issued from the office before the expiry of the returnable date fixed

therein the and even thereafter, the office did not give any report to the Registrar or the Master or the Court for passing necessary order extending

the returnable date. Thus, the principles laid down in the said case of a correct order of recording dismissal of suit cannot have any application to

the facts of the present case where the provision contained in Order 9 Rule 5 of the Code is not even attracted.

32. In the case of Shrikant Mantri v. Radheshyam Chotia and Ors., reported in 2006 (3) CAL LT 230, the Plaintiff alleged in their application that

on enquiry it transpired that till the filing of the said application No. writ of summons was lodged with the Sheriff and as such, the Plaintiff had No.

real intention to prosecute the suit. Accordingly, the Defendant filed an application for rejection of the plaint. According to the Defendant, in the

said proceeding, the writ of summons remained unserved for six years, and No. explanation was given why the notice in terms of leave earlier

granted under Order 1 Rule 8 of the CPC could not be published in newspapers. In that case, the Plaintiff filed an application for extension of the

returnable date of the writ of summons and condonation of delay in making the said application. Ultimately, the Court held that sufficient cause was

not made out explaining the delay in lodging the summons. Therefore, in that case in spite of filing of the suit, the Plaintiff did not lodge the original

writ of summons within the prescribed period whereas in the case before us, the summons was lodged which the office could not prepare for

issuing for service within the returnable date and thereafter, the Office did not even place the matter before the Registrar or the Master or the court

for extension of returnable date and the Plaintiff of his own prayed for extension when the matter appeared in the warning list.

33. Therefore, the said decision is of No. avail to the Respondent.

34. In this connection, we may profitably refer to a Division Bench of this Court in the case Tarak Chandra Roy v. Abdul Rashid Rehman Shaikh

and Anr., reported in 2010 (2) CHN 144, where the Division Bench, while dealing with an appeal arising out dismissal of a suit in the Original Side

of this Court, specifically held that there was No. scope of dismissing a suit for not taking step for service of writ of summons once it was found

that the Plaintiff, within the time fixed by law, had taken such step, but thereafter, neither the office had reported any alleged non-service through

the first attempt nor had the Court decided about the fate of such first attempt on the basis of such report nor had any direction been given to the

Plaintiff for taking fresh step. The said decision applies to the facts of the present case and we respectively follow the said decision.

35. On consideration of the aforesaid materials, we, thus, find that in the case before us, there was No. necessity of giving any notice to the

Defendant before his appearance and thus, the learned Single Judge acted illegally in recalling the order passed by His Lordship"s predecessor.

We cannot lose sight of the fact that the Defendant after entering appearance in the suit pursuant to the service of writ of summons prayed for time

to file written statement which was allowed but in spite of that, did not file written statement within the extended time and after the expiry of such

time, the Defendant came up with the application for recall of the earlier order. Therefore, in the facts of the present case in view of the above

conduct of the Defendant the learned Single Judge should not have even entertained such a frivolous application filed by the Defendant.

36. Some other decisions of the learned Single Judges of this Court were cited before us by Mr. Chowdhury in support of his contention. All those

decisions related to either non-lodging of original writ of summons or for not taking step within the time fixed under Order 9 Rule 5 of the Code.

We have already pointed out that the case before us in not one of ""summons returned unserved after issue"" but is one of ""non-issue of summons

from the office at all"" and thus, Order 9 Rule 5 of the Code cannot have any application. The real nature of an application, it is needless to mention,

is not determined by the caption under which it is made but by its averments it contains.

37. We, thus, set aside the order passed by the learned Single Judge and restore the one passed by P.K. Deb, J. The suit should now proceed in

accordance with law from the stage it reached before the passing of the order of the learned Single Judge impugned in this appeal.

38. In the facts and circumstances, there will be, however, No. order as to costs.

I agree.

Sambuddha Chakrabarti, J.

Later:

Urgent xerox certified copy of this judgment be supplied to the parties, if applied for, within a week upon compliance of all other requisite

formalities.