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Calcutta High Court

Case No: Suit No. 695 of 1977

Fort Gloster Industries Ltd. and Another		APPELLANT
	Vs	
Tatanagar Transport Corpn. and Others		RESPONDENT

Date of Decision: Aug. 4, 1986

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 5

Citation: 91 CWN 391

Hon'ble Judges: Ajit Kumar Sengupta, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Ajit Kumar Sengupta, J.

This application has been made by the plaintiffs on 12th June, 1986, inter alia, for leave to lodge fresh writ of summons for service upon the defendant through the Baillif of this Court and also under registered post with acknowledgement due and for extension of returnable date of the Writ. Since the said application was mislaid another application on identified terms to be filed today. Let it be kept on record. The suit was instituted on 10th November, 1977 but the writ of summons has not. been served upon the defendants till the date of this application made in June, 1986. The ground urged for non service of writ of summons upon the defendant has been stated by the plaintiffs in paragraph 3 and 4 of the petition. It is stated that due to bonafide inadvertance, no steps were taken for lodging the writ of summons with the Sheriff for service upon the defendants as the petitioner''s Advocate on record was lying seriously ill. It is also stated that the learned advocate on record after making enquiries came to know on 20th February, 1986 that the summons had not boon lodged with the Sheriff for service upon the defendants.

2. Mr. S. K. Mullick, Advocate appearing for the plaintiff, has relied on order 9 Rule 5of the CPC and also on an unreported judgment of this Court in the case of Tusnial Trading Co. v. Himangshu Kumar Roy & Ors. in Appeal No. 318 of 1982 (Suit No. 818 of 1978). The judgment was delivered by the Division Bench presided over by R. N. Pyne, 3. on 20th March, 1985.

3. In view of the importance of this case, I appointed Mr. Nirmal Mitra, learned advocate as Amicus Curea and he has assisted the Court and the Court records its appreciation for such assistance rendered by Mr. Mitra.

4. Order 9 Rule 5 of the CPC provides as follows

Dismissal of suit where plaintiff, after summons returned unserved, fails for three months to apply for fresh summons (1) where, after a summons has been issued to the defendant, or to one of serveral defendants, and returned unserved, the plaintiff fails, for a period of one month (k) from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons, the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff (s) has within the said period satisfied the Court that

(a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served, or

(b) such defendant is avoiding service of process, or

(c) There is any other sufficient clause for extending the time, in which case the Court may extend the time for making such application for such period as it thinks fit. (2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

5. In the petition for extension of time for service of the writ of summons, it has been stated that the writ of summons could not at all be served upon the defendants. It has not been stated in the petition as to the steps taken or attempts made by the plaintiffs for service of writ of summons upon, the defendants. It is also not the case of the plaintiffs that the defendants evaded service of process of this Court. It is a case where the plaintiffs did not take steps for service of the writ of summons at all.

6. Prior to the amendment of the Code of Civil Procedure, a plaintiff in a suit was required to serve writ of summons upon the defendant within three months from the date of filing of the suit and in the event the summons was returned unserved from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officer, the plaintiff was to apply for issue of the fresh summons and in the event the plaintiff failed to apply to the Court for issue of a fresh summons within the time limit the suit was liable to be dismissed. After the amendment the time has been reduced to one month and since this is a

suit of 1977 the amendment of 1976 would be applicable. In this case it has not been stated by the plaintiffs as. to whether any attempt was at all made by the plaintiffs for service of summons to the defendants from the date of filing of the suit, that is, 10th November, 1977 within the period of one month as provided under the provisions of Order 9 Rule 5 of the Code of Civil Procedure.

7. The ground that due to illness of the Advocate on Record for the plaintiffs the writ of summons could not be served for service upon the defendants is absolutely vague and devoid of particulars. It is not stated when the Advocate on Record fell sick after 10th November, 1977 and how long such illness continued. No supporting document with regard to such alleged illeness of the plaintiffs'' Advocate on Record has been annexed. The averment made in paragraph 4 of the affidavit is contrary to what has been stated earlier. It is alleged that on 20th February, 1986 the learned Advocate on Record for the plaintiffs upon enquiry came to know that the summons in respect of the above suit had not been lodged with the Sheriff for service upon the defendants. It only means that after more than 8 years, the plaintiffs Advocate on Record, for the first time, ascertained that the writ of summons in respect of the above suit could not at all be served upon the defendants. As indicated above, no explanation has been given in the petition as to what steps were taken by the plaintiffs for conducting or prosecuting the suit since the date of the filing. If the Advocate on Record for the plaintiffs was ill, when the suit was filed on 10th November, 1977, immediately thereafter an application ought to have been made for extension of time for lodging the writ of summons but that was apt done. A plea has been taken by the plaintiffs that the Advocate on Record for the plaintiffs came to know for the first time on 20th February 1986 that the writ of summons in respect of the suit had not been lodged with the Sheriff.

8. It is also significant that although, according to the plaintiffs, their Advocate on Record came to know on 20th February 1986 that the writ of summons had not been lodged with the Sheriff for service upon the defendants but the summons was taken out by the plaintiffs in June 1986, that is, after a lapse of about 4 months. No explanation has been given for such inordinate delay in making this application. Even a prayer has not been made in the petition for condonation of delay. Thus, the plaintiff has neither given any explanation why the writ of summons could not be served upon the defendants nor any reason has been given for making this application, at this stage, after 8 years. The judgment of this Court in the case of Tusnial Trading Co. (supra) relied on by the plaintiffs has no application to the facts and circumstances of this case. In that case C. K. Banerji, J. allowed the application of respondent no. 1 for dismissal of suit. The learned Judge was of the opinion that there was gross negligence and delay on the part of the plaintiff and its Advocate on Record and there was no explanation for non issuance or non service of the writ of summons in the suit which was filed on 16th November, 1978. There, a contention was raised that there was no default on the part of the plaintiff but such default was on the part of the advocate on Record for the plaintiff. The Court proceeded on that

basis and held as follows

After a legal proceeding is instituted it is not, in the absence of any special reasons, generally required of a party to enquire whether proper steps, particularly procedural in nature, are being taken in the matter. We are expressing our thorough disapproval and dissatisfaction the way the instant case has been conducted by the Advocate on Record of the appellant or the Advocate of the said firm in charge of the matter or the clerk. In our view, in the absence of any special reason only because the appellant did not enquire from time to time from its Advocates on Record as to what was being done in the suit that would amount to sufficient negligence or default of a party who has filed a suit for recovery of a substantial amount it should be penalised.

9. In that case, no question was raised as to whether the Court has any power to extend the time for service of writ of summons in view of.the provisions contained in Order 9 Rule 5. Mr. Mitra has relied on a judgment of. this Court in the case of Laxmi Trading v. Shriram Govindnarain reported in 61 CWN 212. In that case no application was made for issue of a fresh summons that was returned unserved nor was any application made within the prescribed period for extension of time. The question was whether, under those circumstances, the Master was right in holding that he could not possibly make any order on the application and whether the learned Judge was right in upholding the Master. Chief Justice Chakravartti, speaking for the Court held at page 216 of the report as follows

The scheme of the Rule'' seems to me to be this. Where the writ of summons first issued is returned unserved, the plaintiff must make an application for the issue of a fresh summons within three months from the date on which the summons was so returned, if however he fails to make such application he is given the right to make another application also within the said period, that is to say, three months, but that is to be an application for extending the time for making the other application, namely, the application for the issue of a fresh summons. If within such time the plaintiff makes out to the satisfaction of the Court, that is to say the Master, that he failed to cause the summons to be served for a reason recognised by the Rule or that there is some other sufficient reason for which time ought to be extended, the Master may extend the time. But extend the time for what? The Rule says extend the time for making such application, that is to say, for making an application for the issue of a fresh summons. I confess that the prescription of the same period for making an application for the issue of a fresh summons and for making out a sufficient reason for extending the time, might prima facie seem to create some difficulty, but a close examination will show that no difficulty really exists. The sufficient cause to be made out under the second part of the Rule is not cause for failure to make an application for the issue of a fresh summons, but cause for failure to discover the residence of the defendant or some other reason for which service could not be effected. It is quite a workable construction of the rule to hold that the

plaintiff will have to apply within, three months from the date on which the summons was returned unserved either for the issue of fresh summons or for an extension of time to make the application for the issue of a fresh summons, if he needs an extension. It may be said that if he has to apply for an extension of time within the same three months, he might as well make an application at once for the issue of a fresh summons and it is not intelligible why, if some part of the three months is still left, as it must be it the application for the extension of time is to be made within three months, he should trouble to ask for an extension of time, instead of making the application for the issue of a fresh summons straight-way. The answer I conceive is that even when the period of three months is drawing to a close, the plaintiff may not be in possession of the necessary particulars about the defendant which will enable him to cause the summons to be served, and therefore, he may not yet be in a position to apply for the issue of a fresh summons It is clear from the terms of the Rule to which I have just referred, that where the plaintiff has not made an aplication for the issue of a fresh summons within the three months, nor has made an application within that period for an extension of time, the Master can no.longer entertain an application for such extension, far less an application for the issue of a fresh sumons and that in the situation which arises, the Court will be bound to make an order that the suit be dismissed, the learned Master, therefore, was entirely right in the present case in refusing to make any order on the appellant''s application and the learned Judge''s order appealed from is also right.
In my view the principles laid down in the said decision will equally apply to the facts and circumstances of this case. A right has accrued in favour of the defendants. Even a copy of the Master''s summons was not served upon the defendants. Having regard to the fact of this case and having regard to the. explanation given, I do not find any reason to extend the time for lodging a fresh writ of summons with the Sheriff. For the reasons aforesaid, this application and is dismissed without any order as to costs.

Since the application has been dismissed, the suit is also dismissed without any order as to costs.