

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Reserve: 14th December, 2009

Date of Order: February 02, 2010

IA No. 7606/07, IA No. 7607/07, IA No. 9007/08 & IA No. 9008/08
in CS(OS) No. 752/2000

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02.02.2010

Media Coverage Pvt. Ltd.

... Plaintiff

Through: Mr. Sanjeev Anand, Advocate with
Mr. Murari Kumar, Ms. Divya Nishan and
Mr. Prateek Kumar, Advocates

Versus

Harish Nagewala & Ors.

... Defendants

Through: Mr. Anil Kher, Sr. Advocate with
Mr. Anurag Ranjan, Advocate

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

ORDER

By this order I shall dispose of applications under Order 9 Rule 13 CPC made by the applicants/defendants for setting aside the ex parte decree dated 19th March, 2001 passed by the Court in a suit under Order 37 CPC.

2. The brief facts relevant for the purpose of deciding this application are that the plaintiff filed a suit under Order 37 CPC for recovery of Rs.1,11,75,243.40 along with interest @ 24%. The summons of the suit were sent to the defendants through ordinary post. Perusal of order-sheet dated 19.9.2000 would show that the service report was not on record although plaintiff had contended that the defendants had refused to receive the summons. The case was next taken up on 17.10.2000 when the plaintiff contended that summons were also sent by registered post and they were duly served. Again the postal receipts were not filed and the Counsel sought some time to trace the same and place on record. The matter was again listed on 8.11.2000. On 8.11.2000, the Court perused the process server report and also saw the postal receipts placed on record and came the conclusion that defendants were deliberately evading service thus gave directions for publication of

notice in newspaper 'Statesman' in the prescribed format under Order 37 CPC. The notice was published in newspaper dated 20.12.2001 and after publication of notice when none appeared for the defendants, the Court decreed the suit in favour of the plaintiff for Rs.1,11,75,423.40 with 15% interest on the ground of not entering appearance. Thereafter an Execution was filed in the Court and notice of Execution was sent to the defendants through courier. The defendants received this notice and then moved an application under Order 9 Rule 13 CPC. Defendant no.2 moved a separate application. Defendants no. 1, 3 & 4 moved a separate application but the contents of both the applications are more or less the same.

3. The contention of defendants is that the reports of the process server, who allegedly had taken the service to the defendants' places were manipulated. The process server had not given the name of the plaintiff's agent who accompanied him and the report stated in respect of Ajay Nagewala stated that on the identification of representative of plaintiff, he (process server) enquired about Ajay Nagewala and father of Ajay Nagewala was found present at the place. He tried to give summons to him but he after reading the same refused to receive the summons. Since there was no witness on the spot, the summons could not be affixed on spot. After getting the signature of the representative of the firm, he submitted the report. A report in respect of Harish Nagewala was similar except that he had met brother of Harish Nagewala on identification of representative of plaintiff firm at the address of Harish Nagewala. It is submitted by defendant that Harish had no brother. In respect of Mohan Nagewala it is stated that Mohan Nagewala himself met him but he refused to receive summons.

4. It is submitted that all the reports were stereotype reports and the process server had not mentioned the name of the representative of plaintiff, who identified the addresses of the persons. Similarly, the fact of service through registered post was also doubtful because neither the AD card had come back nor the registered cover had come back with refusal report. Regarding publication, it is stated that the 'Statesman' was having limited circulation in Jaipur, i.e., the place of residence of defendants. It is also submitted that the plaintiff had filed another suit before this Court against sister concern of the defendants and summons in that case were served on all the defendants and defendants had challenged the jurisdiction of this Court ultimately, the suit was dismissed for lack of jurisdiction as the jurisdiction was only of Jaipur. Looking at the result of the earlier suit, the plaintiff manipulated the service and obtained ex parte decrees. The advocate of the plaintiff was same in this suit as in the other suit. Except the name of sister concern, all the other

defendants were same. It is submitted that the defendants had not come to know of the filing of the suit and there was no question of evasion of the service. The moment defendants learnt about the execution, they inspected the file and came to the Court.

5. In reply, the plaintiff /non-applicant had refuted all averments made by the applicants in the application and taken the stand that the averments were false to the knowledge of the defendants and defendants were very much aware of the filing of suit. The plaintiff had sent the summons by registered post, the reports of the process server were genuine and they (applicants) deliberately refused to receive summons from the process server.

6. A perusal of the summons sent to defendants through the District Judge Jaipur would show that the summons were not marked to any process server by the District Judge or by office of the District Judge and directly a report is there on the summons. The report on summons of Ajay Nagewala, Harish Nagewala are of 27th May 2000 and that of Ramesh Chand are of 30.5.2000. All the reports are counter signed on 30.5.2000 by the process serving agency of District Court Jaipur. These reports do not create confidence and that seems to be the reason that this Court had ordered for publication. Similarly, although postal receipts of pasting notices have been filed but there is no refusal report or report of receiving back the summons and the court directed service through publication.

7. An objection is taken by the plaintiff that application under Order 9 Rule 13 CPC was not maintainable in case of a decree passed under Order 37 CPC and only an application under Order 37 Rule 4 CPC would be maintainable. It is settled law that merely filing an application under wrong provision of law would not non-suit the applicants and the court can treat the application under the correct provision of law if the contents of the application meet the requirements of the correct provision of law.

8. The other plea raised by the non-applicants/plaintiffs is that the application under Order 37 CPC and under Order 9 Rule 13 CPC are not synonymous and where a decree is passed under Order 37 CPC and an application is made for setting aside the decree, the Judgment Debtor/Defendant has to disclose his defence. In this case, the defendant has not disclosed the defence and therefore the application was not maintainable. The plaintiff relied on Rajni Kumar v. Suresh Kumar Malhotra & Anr. AIR 2003 SC 1322 wherein Supreme Court observed as under:

10. It is important to note here that the power under Rule 4 of Order 37 is not confined to setting aside the ex parte decree. It extends to staying or setting aside the execution and giving leave to appear to the summons and to defend the suit. We may point out that as the very purpose of Order 37 is to ensure an expeditious hearing and disposal of the suit filed thereunder. Rule 4 empowers the Court to grant leave to the defendant to appear to summons and defend the suit if the Court considers it reasonable so to do, on such terms as Court thinks fit in addition to setting aside the decree. Where on an application, more than one among the specified reliefs may be granted by the Court all such reliefs must be claimed in one application. It is not permissible to claim such reliefs in successive petitions as it would be contrary to the letter and spirit of the provision. That is why where an application under Rule 4 of Order 37 is filed to set aside a decree either because the defendant did not appear or response to summons and limitation expired or having appeared did not apply for leave to defend this suit in the prescribed period, the Court is empowered to grant leave to defendant to appear to the summons and to defend the suit in the same application. It is, therefore, not enough for the defendant to show special circumstances which prevented him from appearing or applying for leave to defend, he has also to show by affidavit or otherwise, facts which would entitle him leave to defend the suit. In this respect, Rule 4 of Order 37 is different from Rule 13 of Order 9.

11. Now advertent to the facts of this case, though appellant has shown sufficient cause for his absence on the date of passing ex parte decree, he failed to disclose facts which would entitle him to defend the case. The respondent has right in his submission that in the application under Rule 4 of Order 37, the appellant did not say a word about any amount being in deposit with the respondent or that the suit was not maintainable under Order 37. From a perusal of the order under challenge, it appears to us that the High Court was right in accepting existence of special circumstances justifying his not seeking leave of the Court to defend, but in declining to grant relief since he had mentioned no circumstances justifying any defence.

9. It is submitted by Counsel for the applicants that in a case where the service on defendant itself was not a valid service and the defendant had not received the copy of the plaint, the defendant would not be in a position to disclose the defence and make a composite application. The applicants relied on Manjari v. Ranjit Singh 2007(146) PLR 15 (DB), a judgment of this Court wherein this Court considered the judgment of Supreme Court in Rajni Kumar (supra) case and observed as under:

4. The finding recorded by the Trial Court that the service effected upon the defendant-appellant herein was not in accordance with law has not been assailed before us by the plaintiff-respondent. That being so, the only question that falls for our consideration is whether the Trial Court was justified in refusing to exercise its powers under Order 37 Rule 4 of C.P.C. even after it came to the conclusion that the defendant had not been properly served. The Trial Court has, as noticed above, declined to invoke its powers on the ground that the

defendant-appellant had not raised any triable issue. It has, in support of that line of reasoning, relied upon a decision of the Supreme Court in Rajni Kumar v. Suresh Kumar Malhotra & Anr. [2003]3SCR66 . We have gone through the said decision but find it difficult to hold that the same interprets the provision of Order 37 Rule 4 in the manner understood by the Trial Court. That was a case in which the defendant was served by registered A.D. where after an application under Order 37 Rule 4 of the C.P.C. was filed seeking an order setting aside the ex pane decree. This application was dismissed by the Trial Court on the ground that the same did not disclose any special circumstance to warrant an order under Rule 4 of Order 37 of C.P.C. The High Court before whom the said order was challenged also agreed with the Trial Court and dismissed the revision petition filed against the said order. In a further appeal before the Supreme Court, Their Lordships held that non-service of summons will undoubtedly be a special circumstance within the meaning of Rule 4 of Order 37 of C.P.C. Having said so, Their Lordships also observed that if in an application, more than one relief could be granted by the Court, all such reliefs must be claimed by the party concerned. The Court declared that it was impermissible to claim such reliefs in successive petitions as it would be contrary to the letter and spirit of the provision. The Court observed:

Where on an application, more than one among the specified reliefs may be granted by the Court all such reliefs must be claimed in one application. It is not possible to claim such reliefs in successive petitions as it would be contrary to the letter and spirit of the provision. That is why where an application under Rule 4 of Order 37 is filed to set aside a decree either because the defendant did not appear in response to summons and limitation expired, or having appeared, did not apply for leave to defend this suit in the prescribed period, the Court is empowered to grant leave to defendant to appear to the summons and to defend the suit in the same application. It is, therefore, not enough for the defendant to show special circumstances which prevented him from appearing or applying for leave to defend, he has also to show by affidavit or otherwise, facts which would entitle him leave to defend the suit. In this respect, Rule 4 Order 37 is different from Rule 13 of Order 9.

5. It is evident from the above that the situations in which the law expects the party concerned to seek all the reliefs available to it have been limited to only two classes of cases viz. one where the defendant did not appear in response to summons and the period of limitation for doing so expired and the second where having appeared, the defendant did not pray for any leave to defend the suit within the prescribed period. In either of these cases, the Court could grant leave to the defendant to appear in response to the summons and to defend the suit in the same application which ought to raise triable issues to justify grant of leave. That is not, however, the position before us. We are dealing with a case where the service of summons upon the defendant was itself defective. In such a case, the Court passing an ex parte decree can and is indeed bound by law and equity both to set aside the decree passed by it. It would be unnecessary in any such case for the defendant to go a step further and not only establish that he had not been served with summons but also that he had a triable issue to raise in the suit. The occasion for raising a triable issue would arise only if the ex parte decree is first set aside and the defendant

relegated back to the position where he can make an application for grant of leave to defend. It would be premature to require the defendant to show whether or not he has a triable issue to raise at a stage at which he was yet to get rid of the ex parte decree. That is precisely what the Trial Court appears to have done in the present case. Instead of invoking its powers under Order 37 Rule 4 of the C.P.C. and setting aside the ex parte decree, the Court appears to have prematurely demanded the existence of triable issues. That approach was not in our view legally correct and has resulted in miscarriage of justice.

10. In the present case, the notice served upon the defendants by way of publication was not a notice of a suit under Order 37 CPC. Even if it was to be served by publication, it could be served by publishing the contents of the suit so that the defendant put appearance in the Court and thereafter summons for judgments are served upon the defendants. In the present case, as in Manjari' case (supra), the service was effected by publishing an ordinary notice in the newspaper and not a notice under Order 37 CPC by publishing the plaint and this was not a proper notice and was a defective notice.

11. I, therefore consider that the notice through publication, which was treated as proper service by this Court was not a proper service and if at all it was a service it was a defective service and the applications under Order 9 Rule 13 CPC are therefore liable to be allowed. I, therefore allow these applications. The decree dated 19.3.2001 passed by this Court is therefore set aside. Consequentially, applications (IA No. 7607/07 & IA No. 9008/08) for staying the proceedings of Decree Execution also stand disposed of.

CS(OS) No. 752/2000

Since the defendants are now having copy of the paper book and are aware of all the facts, the defendants shall file leave to defend within 10 days of pronouncement of this order.

February 02, 2010
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SHIV NARAYAN DHINGRA, J.