

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

+ **FAO No. 359/2008**

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May 23, 2011

JAI KISHAN GUPTA

..... Appellant

Through: Mr. Nitin Soni, Advocate

VERSUS

HINDUSTAN PAPER CORPORATION LTD.

..... Respondent

Through: Mr. Nikhilesh Krishna, Advocate.

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this first appeal under Order 43 CPC is to the impugned order dated 11.7.2008 which dismissed the application of the appellant under Order IX Rule 13 CPC for setting aside the ex parte money decree dated 5.5.2004. As per the decree, the respondent/Hindustan Paper Corporation Ltd./Public Sector Undertaking, was held entitled to a decree for a sum of Rs.10,17,285.47 with respect to the stock of paper supplied by it to the appellant/defendant.

2. The only issue before the trial court was as to whether the appellant/defendant was served in the suit. This aspect is dealt with by the trial court and the issue decided against the appellant by giving the

aforesaid observations:-

“(B) Now, the short question is left to be decided is whether there was bona-fide or sufficient cause for the defendant to appear and contest the present suit or was there any circumstance, which prevented the defendant from appearance in the Court. The following reasons and conclusions proved that neither there was any sufficient cause nor bona-fide to permit the applicant/defendant’s the second and the first application:-

(i) the defendant is not an illiterate person but an educated business;

(ii) the defendant was sent two summons, one in the name of Shri Jai Kishan Gupta, proprietor (defendant no.1) and another summon in the name of M/s Jackson Mayo & Associates (defendant no.2); both the summons were received by the defendant, as per the acknowledgment on the summons itself.

Only the summons meant for the defendant no.2, the defendant had received copy of the plaint. Whereas, summons were received without copy in respect of other summon. To say, copy of the plaint was received by the defendant;

(iii) the summons received by the defendant were not only bearing suit number (i.e the then Suit No.577/00) besides date of hearing 15.01.2001 at 10:30 A.M, the name of the suit;

(iv) the copy of the plaint under order XXXVII CPC has also placed on record and on the face of the plaint of Order XXXVII CPC, not only the amount stated (i.e. Rs.10,27,212/-) is different from the present suit for Rs.10,17,285.47p but also the previous suit depicts summary suit under order XXXVII CPC, the defendant, being an educated, is expected to have gone through both the suits;

(v) the suits were bearing different suit numbers;

(vi) in case of summary suits, the summons on the prescribed form do not decipher the date of hearing.

Whereas, in the present case, the summons were depicting next date of hearing;

(vii) it is undisputed that Shri S.C.Sarda, Advocate is representing the defendant in another Suit No.269/00;

(viii) the plaintiff filed reply to the application on 22.09.2006, raising an objection that an affidavit of Shri S.C.Sarda, Advocate, has not been filed in support of the application but the defendant placed on record the affidavit dated 01.09.2007 of Shri S.C.Sarda, Advocate along with the written submissions filed on 17.05.2008, without any explanation or reasons, as to why the affidavit was not filed earlier;

(ix) when the defendant is an educated person, he was having not only summons of the case but also copy of the plaint and there was an occasion for him to go through the same, particularly when there was huge amount of suit, which makes any imprudent person cautious by seeking instructions or advises telephonically from Shri S.C.Sarda, Advocate or Shri S.C.Sarda, Advocate without going into written merits of the plaint, had advised them not to bother, as if, the summons were received again in the same suit. It is not the situation of bona-fide but gross negligence or intentional avoidance from appearance in the Court;

(x) Since the summons along with the plaint received by the defendant speaks a volume, however, the defendant forming an opinion of its own or on the advised of other that it need not to appear or it is a repeated summon, would not constitute either sufficient cause or a cause, which prevented him from appearance in the Court;

(xi) the plaintiff had specifically narrated in the plaint about filing of another suit under summary trial with further narration that the claim in the present case is in respect of the amount other than the amount claimed in the summary suit. How there was misrepresentation or concealment of feature of the other case, do not decipher from the record; and

(xii) the application under order IX Rule 13 CPC is also barred by Article 123 of Limitation Act, 1963.”

3. I have gone through the summons which were issued to the appellant/defendant. There were two defendants in the suit. Defendant no.1 was the proprietor by name and defendant no.2 was the sole proprietorship concern. Therefore, the defendants no.1 and 2 are but the same person. Summons were in fact delivered to the address as stated in the summons, and which is the admitted address of the appellant. The process server has reported that summons were duly served along with the copy of the plaint. Summons with the endorsement are filed at page numbers 95 to 96A of the appeal paper book.

4. In my opinion, the findings and conclusions of the trial court reproduced above are completely justified. The trial court has rightly dismissed the application under Order IX Rule 13 CPC because the appellant was duly served with the summons and with which a copy of the plaint was annexed.

5. Learned counsel for the appellant placed reliance upon the decision of the Supreme Court in ***Nahar Enterprises Vs. Hyderabad Allwyn Ltd. (2007) 9 SCC 466*** to canvass that the service is not a proper service if the summons are not accompanied by the plaint. Firstly, there is no dispute to this proposition of law however in the present case the Process Server, a government official, has reported that the summons were served along with

the copy of the plaint. In terms of Section 114 of the Evidence Act, 1872, judicial and official acts are deemed to have been properly performed. I would therefore not like to disbelieve the report of the Process Server which records the fact that the copy of the plaint was served along with the copy of the summons.

6. I would also at this stage seek to refer to Second Proviso inserted by virtue of the Amending Act 104 of 1976 w.e.f. 1.2.1977 to Order 9 (13) CPC. This Proviso reads as under:-

“[Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim.]”

The aforesaid proviso has been inserted by the legislature which shows that a court shall not set aside a decree passed *ex parte* merely on the ground that there has been irregularity in the service of summons, if the court is satisfied that the defendant had notice of the date of hearing. In the present case, I would seek to apply this proviso, inasmuch as, assuming that the appellant did not receive the copy of the plaint, surely, he had notice of the date of hearing in the suit and could have well appeared and asked for a copy of the plaint/paper book in the court on the date of hearing.

7. It is quite clear that the present proceedings have been filed to delay and defeat the money decree passed in favour of the respondent and which entitlement is because the appellant was bound to pay monies for the stock

paper received by him. There is no ground to interfere with the impugned order. The appeal therefore being without merit is accordingly dismissed leaving the parties to bear their own costs. Trial court record be sent back.

May 23, 2011
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VALMIKI J. MEHTA, J.