

* IN THE HIGH COURT OF DELHI AT NEW DELHI
Date of Decision: 28.05.2014

+ **CM(M) 1117/2012**
RAJENDRA SINGH RATHORE Petitioner
Through: Mr. Tushar Singh, Adv.

versus

DELHI METRO RAIL CORPORATION Respondent
Through: Mr. B. L. Wali, Adv.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

% **MR. JUSTICE NAJMI WAZIRI**

1. The present petition has been preferred by the petitioner under Article 227 of the Constitution of India against the order dated 24th September, 2012 (“**impugned order**”) of the Additional District Judge – I, Patiala House Courts, New Delhi (“**Trial Court**”). The impugned order came to be passed upon an application under Order XXXVII rule 4 (“**Application**”) of the First Schedule to the Code of Civil Procedure (“**Code**”) by the petitioner (who was defendant) in Suit 281/11 (“**Suit**”), which was filed under Order XXXVII of the Code. By the impugned order, the learned Trial Court rejected the Application, holding that the appellant has failed to demonstrate any special circumstances justifying setting aside the *ex-parte* decree dated 7th December, 2011.
2. Although extensive arguments were made by the respondent as to the maintainability of the petition, this Court finds it unnecessary to

consider the same in detail. The petitioner has preferred the petition under Article 227 to contend, primarily, that (i) the summons was actually never served upon him and (ii) the Suit was not maintainable and ought to not be considered under Order XXXVII of the Code. The respondent contended that the petition is not maintainable inasmuch as an appeal would be maintainable against the decree. This Court does not wish to opine on whether an appeal would have been maintainable against the impugned order, although the Rajasthan High Court has, in one matter, held the same in the negative.¹ The proceedings having been instituted under Article 227, this Court shall consider the same under the said provision, while bearing in mind the inherent as well as self-imposed limitations on the powers of superintendence, and refrain from converting itself into a court of appeal.²

Facts

3. The genesis of the dispute, according to the Suit, can be traced to an agreement in the form of a letter of offer from the respondent to the petitioner, dated 16th July, 2010 (“**letter of offer**”). The letter offered to the petitioner an appointment to the position of Executive Trainee (Civil) in the respondent’s organisation, and to undergo a course for a Post-Graduate Diploma in Metro Technology and Management, at the Indian Institute of Technology, Delhi. The training was to be at the risk and cost of the respondent, who further offered an amount of ₹ 25,000/- (Rupees twenty five thousand only) *per mensem* as

¹ *Mohan Lal v Om Prakash*, AIR 1989 Raj 138, at p. 184.

² *Surya Devi Rai v Ram Chander Rai & Ors.*, (2003) 6 SCC 675.

stipend for the duration of the training. The letter of offer further provided that upon successful completion of the training, the petitioner shall be appointed as Assistant Manager (Civil) at a pay scale of ₹ 26,000 - 46,500/- (Rupees twenty six thousand to forty six thousand five hundred only) by issuance of a formal letter of appointment (“**appointment assured**”).

4. The letter of offer contained certain other clauses that are relevant to the dispute:

4.1. That the petitioner shall execute a deed, termed as a “bond”, binding himself to serve the respondent for a period of five years from his date of joining the course. Further, in the eventuality of the petitioner being dismissed for *serious misconduct*, the bond shall be forfeit.

4.2. That the petitioner ought to obtain the Diploma by scoring the minimum percentage of marks or more, as required by the Institution. If the petitioner fails to secure the minimum percentage required to obtain the Diploma, he will not be provided the appointment assured. The petitioner, in this eventuality, ought to pay to the respondent an amount of ₹ 5,00,000/- (Rupees five lakh only), which is termed as “bond amount”.

4.3. That the petitioner ought to maintain *inter alia* discipline, good conduct, and 100% attendance at the institution for the duration of the course; absence, if any, ought to be authorised by the respondent. In case anything adverse is received from the

institution in respect of the petitioner's conduct or discipline, the petitioner may be expelled from the course *sans* assignment of reasons for the expulsion. In this eventuality as well, the petitioner ought to pay the respondent an amount of ₹ 5,00,000/- (Rupees five lakh only), which is termed as "bond amount".

4.4. That if any declaration or information furnished by the petitioner is found to be false or incorrect, or if any material information is found to have been wilfully suppressed, the petitioner's candidature shall be liable for termination without prior notice and *sans* assignment of any reason for the termination. In this eventuality as well, the *bond amount* shall stand forfeit; further the respondent shall also have the liberty to initiate further proceedings in law.

5. Admittedly, the petitioner expressed his acceptance of the terms of the letter of offer on 19th July, 2010. Further, a deed dated 16th July, 2010 was executed by the petitioner in favour of the respondent conditionally undertaking, to pay to the respondent an amount of ₹ 5,00,000/- (Rupees five lakh only), upon demand. The condition for the undertaking was that amount shall be payable towards *expenses incurred by the [respondent] in recruiting, placing and training* the petitioner, if the petitioner were to *inter alia* either (a) abandons, fails to report for, or does not secure the minimum percentage in the course for obtaining the Diploma, or (b) fails to join duty or resigns from employment of respondent or is terminated from service for *any kind of misconduct* within five years from the date of joining the course.

6. It is not controverted that the petitioner refrained from attending certain, if not all, lectures and other programmes of the course. It is also not controverted by any specific traverse of the pleadings that letters were sent to the respondent calling upon him to return to and attend the course, which he refrained from responding to. Eventually, the Suit was filed under Order XXXVII of the Code, claiming payment of the amount of ₹ 5,00,000/- (Rupees five lakh only) as liquidated damages for breach of the contract stated to have been subsumed in the letter of offer, which was accepted.
7. Upon the Suit being filed, the Trial Court directed service of summons of the same by ordinary process as well as by Registered Post. The respondent thus attempted service of summons by ordinary process through the process server, as well as by Registered Post. The summons served through Registered Post was returned with a notation that it was refused on 23rd November, 2011. Regarding this refusal as sufficient service, the Court proceeded to decree the Suit. By its order dated 7th December, 2011, the Suit was decreed *ex parte* and the respondent was awarded the amount of ₹ 5,00,000/- (Rupees five lakh only), with costs and interest *pendente lite* and future at 8% *per annum*.
8. Thereafter, on 20th December, 2011, the petitioner received the summons dispatched through the process server. Upon attempting to file his appearance pursuant to the summons, it appears that the petitioner discovered the existence of the *ex parte* decree against him.

He thereafter filed the Application praying that the decree be set aside. His submissions, *inter alia*, were that:

- 8.1. The summons by the Registered Post was never received / refused by the petitioner; they were never served upon the petitioner.
 - 8.2. The summons was served through process server only on 20th December, 2011, and the time for filing application seeking leave to defend ought to be calculated from the latter date.
 - 8.3. The respondent had played a fraud upon the petitioner and thus induced him to execute the deed of 16th July, 2010 when the letter of offer was provided for his consideration and acceptance only on 19th July, 2010.
 - 8.4. The deed of 16th July, 2010 has no operation or force in the eyes of law, inasmuch as the contract for which it was to be collateral, being the letter of offer, was accepted only on 19th July, 2010.
 - 8.5. That a claim for damages, liquidated or otherwise, will not be maintainable under Order XXXVII as a trial is necessary to prove damage and extent of damage before damages can be decreed.
9. The respondent filed a reply to this application and opposed the application on merits.

The impugned order

10. The Trial Court heard the parties on the issue and then passed the impugned order rejecting the Application. It reasoned that:

10.1. There is no reason to doubt the report of the postal department that the summons was served upon the petitioner, who refused service thereof, on 23rd November, 2011.

10.2. The petitioner has not made any submission as to the breach of the contract. To the contrary, he has only contended that the Suit is not maintainable under Order XXXVII.

10.3. The respondent had provided a stipend of ₹ 25,000/- (Rupees twenty five thousand only) *per mensem* and has expended towards conducting selection process, in procuring admission in the institution in order to have a trained hand employed for a specialised job and reap the benefit of the investment for a minimum period of five years. Given the same, the loss incurred by not having the trained hand for the specialised job is a loss for which money would not form adequate recompense.

10.4. The sum of ₹ 5,00,000/- (Rupees five lakh only), which included expenses for selection, payment of stipend, procuring admission, paying educational expenses and for loss of services for a period of five years cannot be termed as exorbitant.

10.5. The amount, hence, is a reasonable pre-estimate of the likely damage to arise from a breach of the contract, i.e., liquidated damages. The same is not an amount specified *in terrorem*, i.e., it is not a penalty.

10.6. Since section 74 of the Indian Contract Act, 1872 (“**Act**”) provides that a party suffering damage is entitled to reasonable compensation, whether or not actual damage or loss is proved, provided it is not a penalty, respondent is entitled to the liquidated damages of ₹ 5,00,000/- (Rupees five lakh only).

10.7. Thus, no special circumstances warranting the setting aside of the *ex parte* decree have been shown by the petitioner.

Contentions and Analysis

11. Aggrieved by this impugned order, the petitioner has preferred the instant petition before this Court. The Court issued notice on the petition on 9th October, 2012 and the respondent has entered appearance through Counsel and filed its reply as well. The impugned order was stayed by the said order and the stay has continued till date. The Counsels for both parties were heard and the Court took its time for consideration.

As to service of summons

12. The first of the petitioner’s contention has been that the summons has not been served upon him by Registered Post. Petitioner, through counsel, further contended that where a defendant states on affidavit that he has not been served, the matter ought to be put to trial and the *onus* of proof shifts to the plaintiff as to whether the defendant was indeed served with the summons. In support of this contention,

reliance has been placed on *Meghji Kanji Patel v Kundanman Chamanlal Mehtani*,³ and on *Shiv Dutt Singh v Ram Dass*.⁴

13. The impugned order, on this contention, observed that although the tenant has stated on oath/affirmation that the summons were not served upon him on 23rd November, 2011, the material on record – the returned envelope with the notation of *refused* – indicates that the petitioner was indeed served. It observed that the petitioner has not given any reasons for its disbelieving the report of the postal authority – an independent agency. It is this observation and the refusal to accept the statement of the petitioner on oath/affirmation and thereby shifting the *onus* of proof upon the respondent in respect of the service of summons that the petitioner impugns at the first instance. The contention of the petitioner, to the mind of this Court has the effect of stating that as soon as a defendant states on affidavit that he has not been served, the Court is stripped of any discretion and is bound to presume that the defendant is not served unless the plaintiff files conclusive proof of it having indeed been served.

14. Needless to say, this Court finds itself unable to agree with this contention. It is undeniable that section 114 of the Evidence Act, 1872 and section 27 of the General Clauses Act, 1897 posit a presumption – the former *de facto* and the latter *de jure* – in favour of service of the summons in a matter like the present. It is also incontrovertible that where the defendant states on oath/affirmation

³ AIR 1968 Bom 387.

⁴ AIR 1980 All 280.

that the summons has not been served, it would tend to rebut the presumption.⁵ However, this cannot be extended to contend – as was sought to be done in this case – that the Court was bound to accept the statement on oath/affirmation. Nor can it be extended to contend that upon the mere filing of an affidavit stating that the summons is not served, the parties *shall* be relegated to a trial on the issue.

15. By no stretch of imagination can it be stated that the judicial mind of the judge ought to function as an automaton because a party has stated as to something on oath/affirmation. A judge, at all stages of a matter, is required to discharge judicial functions after application of judicial mind to the matter before him. In such circumstances, it is doubtless that a judge before whom the defendant files an affidavit has the power to consider whether the statement in the affidavit is to be believed, *a fortiori* when there is material on record contrary to the statement. The various authoritative pronouncements on this issue ought to also be read to indicate the same; the presumption in fact under section 114 of the Evidence Act, 1872 and the presumption in law under section 27 of the General Clauses Act, 1897 are susceptible to being rebutted by a statement on oath/affirmation – however not every statement on oath/affirmation serve to rebut the presumptions. In every such case, the discretion inherent in every judge discharging

⁵ *Nirmalabala Debi v Provat Kumar Basu*, [1947-48] 52 CWN 659; *Appabhai Motibhai v Laxmichand Zaverchand & Co.*, AIR 1954 Bom 159; *Sushil Kumar Chakravarty v Ganesh Chandra Mitra*, AIR 1958 Cal 251; *Chhaya Debi v Laboriram Prashar*, [1962-63] 67 CWN 819; *Meghji Kanji Patel v Kundanman Chamanlal Mehtani*, *supra*, at n. 3; *Jagat Ram Khullar v Battu Mal*, 1975 RLR 523 : AIR 1975 Del 111; *Puvada Venkateswara Rao v Chidamana Venkata Ramana*, (1976) 2 SCC 409; *Shiv Dutt Singh v Ram Dass*, *supra*, at n. 4.

judicial functions ought to weigh the circumstances, the presumption allowable in fact, the presumption allowable in law and the statement on oath/affirmation and decide which ought to prevail. It is doubtless that the statement on oath/affirmation would ordinarily gain precedence over all else, but the judge shall have the discretion to – for sufficient and sound reasons – disbelieve the statement on oath/affirmation and require further reasons or better proof of the statement sworn to.

16. The Court finds support in its above opinion in various reported cases.⁶ Speaking for the Division Bench, KC DAS GUPTA J. (as he then was), in *Sushil Kumar Chakravarty v Ganesh Chandra Mitra*,⁷ observed:

“(5) ...If the Court chooses to make a presumption under sec. 114 of the Evidence Act, the Court is entitled to hold that this is the correct statement subject to this that if there is evidence to the contrary and that evidence is believed by the Court, the presumption must be held to be rebutted.”
(Emphasis supplied)

17. Answering in the negative the question referred to it of *whether it is incumbent on the plaintiff to prove the endorsement of refusal on the notice sent by registered post by producing the postman or other evidence in case the defendant denies service on him*, SD KHARE J., speaking for the Full Bench of the Allahabad High Court, observed:

“28. ...In the absence of proof to the contrary, it will be presumed that the refusal had been made by the tenant to whom the registered letter was correctly addressed

⁶ *Sushil Kumar Chakravarty v Ganesh Chandra Mitra*, *ibid.*; *Ganga Ram v Smt. Phulwati*, AIR 1970 All 446 (FB); *Puwada Venkateswara Rao v Chidamana Venkata Ramana*, *ibid.*

⁷ *Sushil Kumar Chakravarty v Ganesh Chandra Mitra*, *supra*, at n. 5, p. 252.

at the time when the letter could be expected to reach him in the ordinary course.”⁸
(Emphasis supplied)

18. This view finds support even from the Supreme Court in the oft cited judgement of MH BEG J. (as he then was) in *Puvada Venkateswara Rao v Chidamana Venkata Ramana*,⁹ albeit in his *obiter dictum*. Speaking for the three judge bench, while reconciling the ostensibly divergent views of the Bombay High Court and the Calcutta High Court on this issue, he observed:

“10. The two decisions are reconcilable. The Calcutta High Court applied a rebuttable presumption which had not been repelled by any evidence. In the Bombay case, the presumption had been held to have been rebutted by the evidence of the defendant on oath so that it meant that the plaintiff could not succeed without further evidence. The Andhra Pradesh High Court had applied the ratio decidendi of the Bombay case because the defendant-appellant before us had deposed that he had not received the notice. It may be that, on a closer examination of evidence on record, the Court could have reached the conclusion that the defendant had full knowledge of the notice and had actually refused it knowingly. It is not always necessary, in such cases, to produce the postman who tried to effect service. The denial of service by a party may be found to be incorrect from its own admissions or conduct...”¹⁰

(Emphasis supplied)

19. Thus, there was no error of jurisdiction committed by the Trial Court in not automatically relegating the parties to a trial on the issue of whether the summons were served on 23rd November, 2011. The Trial Court observed that the remark by the postal department – that the petitioner refused to accept service of the summons – is a statement made by an independent authority and that the petitioner has not given any reason to disbelieve the same. This, to the mind of the Court, is the Trial Court’s expression of its disbelief of the

⁸ *Ganga Ram v Smt. Phulwati*, AIR 1970 All 446 (FB), *supra*, at n. 6, p. 451.

⁹ *Puvada Venkateswara Rao v Chidamana Venkata Ramana*, *supra*, at n. 5.

¹⁰ *Ibid.*, at p. 412.

statement of the petitioner on oath/affirmation, in exercise of its discretion. This view – of disbelieving a bald statement on oath/affirmation as to non-service of summons when the remark by the postal department is that service was refused – is a reasonable view and is not unprecedented. The observations of VIKRAMAJIT SEN J. (as he then was) in *Industrial Medical Engineers & Ors. v Anil Nijhawan & Anr.*,¹¹ on similar facts, is particularly instructive in this regard:

“3. It cannot be gainsaid that the Court should be cautious and slow to proceed to adjudicate upon a lis in the absence of a party thereto. A decision taken without affording sufficient opportunity to the affected party of being heard or entering his defence, is anathema to law. It is equally essential that a devious Defendant who is deliberately evading service should not be permitted to delay justice by adopting dilatory designs; this factor is of added significance when a summary suit is being tried. Both these considerations have to be neatly and carefully balanced against each other. If there is scope for doubt, the benefit should be given to the party sought to be served.

5. The Postman is an independent agency whose Report should ordinarily be accepted. No cogent reason has been disclosed before me to doubt that the initial/signature on the AD Card was of a person having the control or management of the partnership business, since admittedly the service was directed to the principal place at which the partnership is carried on. It should not be forgotten that the Postman in the area normally has full knowledge of the identity of the addressees.”

(Emphasis supplied)

20. This Court notes from the records of the Trial Court, which had been summoned during these proceedings, that the plaint in the Suit provided the same address for the petitioner as given by the petitioner himself in the present petition. The packet containing the summons bears the same address as well. Given the same, it cannot be contended that the conclusion arrived at by the Trial Court is contrary to material available on record or manifestly illegal as to

¹¹ 110 (2004) DLT 581, at p. 582.

warrant interference with under article 227 of the Constitution of India.¹² Even assuming there was an error in the exercise of discretion, the same is not an error as to the jurisdiction. This Court, in exercise of its supervisory jurisdiction, will not convert itself into a court of appeal and indulge in correcting errors in drawing inferences or correct errors of mere formal or technical character.¹³ In the circumstances, the challenge to the impugned order on this ground fails and is rejected.

As to the calculation of period of limitation.

21. The second contention of the petitioner was that the prescribed period of limitation of ten days ought to have been calculated from 20th December, 2011 – the date when the summons through process server was served upon him. Placing reliance on *Surinder Kumar v Prem Kumar*,¹⁴ and on *Frank Anthony Public School v Amar Kaur*,¹⁵ it was contended that since the summons served by the process server was received by the petitioner only on 20th December, 2011, the period of ten days for entering appearance ought to be calculated from that date and not from 23rd November, 2011, when the summons by Registered Post was received.

22. This Court finds much merit in this contention. The issue of the date from when the period of limitation ought to be calculated was discussed by AVADH BEHARI ROHATGI J. – albeit in the context of the summary procedure in Delhi Rent Control Act, 1958 under

¹² *Surya Devi Rai v Ram Chander Rai & Ors.*, *supra*, at n. 2, para. 38(6), p. 695.

¹³ *Ibid.*, at para. 38(8), p. 696.

¹⁴ 18 (1980) DLT 255.

¹⁵ (1984) 6 DRJ 47.

Sections 25A to 25C – in *Frank Anthony Public School v Amar Kaur*,¹⁶

where he observed:

“5. The single point for decision in this case is whether fifteen days’ time has to be computed from 11-5-1982 when service was effected by registered post or from 12-5-1982 when summons in the ordinary manner were served on the tenant...

...

9. ...The reason [counsel for landlady] gave in support of his argument was that if the tenant is first served by registered post and then in the ordinary manner, the second service does not wipe out the first service. And the tenant has been served it is good enough. The second service to all intents and purposes in [sic: is] meaningless.

10. In my opinion Section 25-B does not lend itself to the interpretation counsel contends for.

...

12. In the present case service by registered post was effected on 11-5-1982. Service in the ordinary manner was effected on 12-5-1982. The tenant thought that fifteen days will commence from 12-5-1982. The Controller held that they commence from 11-5-1982. In my opinion, the period of fifteen days will commence from the date of the second service, namely, 12-5-1982 when on that day the tenant was served in the ordinary manner by delivering the summons to the Principal.

13. Both in the ordinary manner as well as by registered post summons have to be sent in the statutory form ... In both these summons [sic: summonses] he was told”

“You are hereby summoned to appear before the Controller within fifteen days of the service hereof and to obtain the leave of the Controller to contest the application for eviction on the ground aforesaid; in default whereof, the applicant will be entitled at any time after the expiry of the said period of fifteen days to obtain an order for your eviction from the said premises.”

14. What will the tenant think on getting the registered summons on 11-5-1982 and the ordinary summons on 12-5-1982 as happened in this case ? He will legitimately think that he will be well within time if he applies for leave to appear and contest the application within fifteen days from 12-5-1982. My reasons for this view are three.

15. Firstly both modes of service, namely ordinary service and service by registered post are the requirements of the stature [sic: statute]. Summons have to be issued to the tenant in both the modes. He may be served in both modes or in one or none. If he is “duly served whether in the ordinary way or by registered post” the Controller can proceed to hear the leave application made to him within fifteen days from the service of summons. But if he is served in both ways, the question arises : To which service-the first or the second-do we give primacy ? Remember the

¹⁶ *Ibid.*, at pp. 48-53.

second service has also the sanction of the statute [*sic: statute*]. The first service and the second service stand on an equal footing. They are of equal efficacy and equal weight. So why count fifteen days from the first. Why not from the second. The object of the statute is to issue summons in the two modes giving a direction to the tenant to appear before the Controller to answer the suit which has been brought against him. The tenant is notified that an action has been instituted against him, and that he is required to answer it at the time and place mentioned in the summons. He is required to apply for leave to defend and contest the claim by making an application to the Controller supported by an affidavit.

16. These summons are a notice to the tenant that the action against him has been commenced by the landlord and that judgement will be given against him if he fails to apply for leave to contest “within fifteen days of the service hereof”. In other words, the tenant is notified that he must apply within fifteen days from the service of summons, the statutory period designated in the summons itself, and make answer to the landlord’s claim by applying for leave. So there is absolutely no difference between service in the ordinary manner and service by registered post. Both have the same message for the tenant. But dates are different. If he gets these summons on different dates will he not be entitled to say, “I have come within fifteen days for leave to appear from the date of the second summons which I got on 12-5-1982”? This is what happened in this case. The object of the second service is the same as the first service. There is no difference, qualitatively at least. So why not count fifteen days from the date of the second service. In Kamal Bhandari [*v* Brig. Shamsheer Singh Malhotra¹⁷] the learned Judge said that it cannot be done from the second service because the second service does not “wipe out” the first service. This is true. No one says that the first service is wiped out. At the same time, the statute does not say that you disregard the second service. As I have said, both modes of service have been placed on par by the statute.

17. ...In view of the statutory sanction to the two modes of service the tenant is perfectly within his rights to say that he counted fifteen days from the second summons which he got on 12-5-1982.

...

20. Secondly, I think there is no reason to hold that the period of fifteen days will commence from the date on which the tenant is first served. He gets summons twice over in the same statutory form. When he gets the second summons the Controller does not issue any warning : Mr. tenant, disregard the second summons if you ever get it. You must go by the first service of summons”. No signal. No signpost. If there is no warning signal to him to disregard the second summon he is perfectly entitled to think that both summons have equal value and equal weight because they are after all issued by the same authority and under the same statute. There is nothing to indicate in the second summons that time will be counted from the first service or that the second service shall be disregarded.

21. Thirdly-and it is a corollary of the second-it would be unjust to the tenant if fifteen days’ time is counted from the first service. Not only will it be against the law, it will also be against the principles of justice, equity and fair play if the

¹⁷ (1981) 2 DRJ 260.

Controller tells the tenant, "I will count fifteen days from the first service. You were misled by my second summons. You ought to have disregarded them altogether". Law then becomes not an instrument of justice but a trap for the unwary. Many will be ensnared. A salutary [sic: salutary] provision will prove the undoing of many simple tenants uninitiated into the complexities of law. This case illustrates it.

...

23. The legislature has devised a "Special procedure for the disposal of the application for eviction on the ground of bona fide requirement". It is modelled on Order XXXVII of the Code of Civil Procedure. The object is to reduce delays in litigation. The object is to introduce a "summary trial" in place of full length trial. But it is not the object of the legislature that you deny to the tenant an opportunity to apply for leave to contest on the mere ground that he ought not to have been misled by the second summons..."

(Emphasis supplied)

23. This Court finds itself in respectful agreement with the above conclusions, and is of the view that the judgement would apply on all fours to the present matter, although the same is in respect of proceedings under Order XXXVII of the Code. The judgement proceeds on the basis *actus curiae neminem gravabit*.¹⁸ Merely because the summons was worded in a fashion that had no caveat for a defendant to disregard a later service, the defendant ought to not be subject to a disadvantage. It could be, and indeed was, contended that given the fact that the period of ten days from the date of service of the first summons expired even before the service of the second summons, the facts of the present matter are different from those in *Frank Anthony Public School v Amar Kaur*¹⁹ and hence the same ought to not be applied to the present matter. This contention inspires no confidence in the mind of this Court. The reasoning in *Frank Anthony Public School v Amar Kaur*²⁰ was not that the prescribed period of

¹⁸ Latin: An act of the court harms none.

¹⁹ *Supra*, at n. 16.

²⁰ *Supra*, at n. 16.

limitation gets *extended* because of the second service, but that the prescribed period of limitation has to be *calculated from* the date of the second service. The judgement observes that the second service has as much sanction of the law as does the first and ought to not have been ignored. Hence, this contention of the respondent ought to be rejected.

24. Although the contention – that the prescribed period of limitation ought to have been calculated from the date of service of the second summons – appears to have been raised before the Trial Court by the petitioner in the Application, the same has not been considered by the Trial Court. Indeed, even the reply to the Application has denied the averment raised in this regard, making it a clear issue that the Trial Court ought to have considered. Although the impugned order does not record any submissions as having been made when the Application was heard, in the absence of clear observations to the contrary, it would not be prudent for this Court to assume that an issue arising from the pleadings has not been pressed by the petitioner. Even assuming that during the hearing, the Counsel appearing for the petitioner has not made any specific submissions, the Trial Court would be bound to consider the submissions made in the pleadings and record its findings on the same. Be that as it may, given the clear *dictum* in *Frank Anthony Public School v Amar Kaur*,²¹ the Trial Court would have had to hold that the period of limitation ought indeed to have been calculated from 20th December, 2011, when the second summons was served upon the petitioner.

²¹ *Supra*, at n. 16.

25. However, this Court hastens to add that this does not *ipso facto* invalidate the decree passed. The Trial Court, when it passed the decree, proceeded on the basis that summons was served upon the petitioner when he refused service thereof, and passed the decree. Although it may have been desirable that the Trial Court – having issued the summons by two means – may have awaited the report of the process server, the decree passed *bona fide* on the basis of material available on record would be valid and binding unless set aside. Being an *ex parte* decree passed under Order XXXVII, the petitioner is required to show not only sufficient cause for his absence on the day when the decree was passed, but also sufficient grounds for his being granted leave to defend.²²

26. In the circumstances, although the petitioner's contention is accepted by this Court, it shall proceed to consider the petitioner's grounds on which he seeks leave to defend as well, before deciding the petition.

As to grounds for leave to defend

27. On merits, the only case of the petitioner has been that the Suit would not be maintainable under Order XXXVII as the amount of ₹ 5,00,000/- (Rupees five lakh only) is a penalty and not liquidated damages. Relying on *Karim Hussainali Wajawalia & Anr. v Origin Information Technology (India) Ltd.*,²³ *Vishal Engineers & Builders v Indian Oil Corporation Ltd.*,²⁴ *Sipca India Ltd. v Manas Pratim Deb*²⁵ and *State*

²² *Rajni Kumar v Suresh Kumar Malhotra & Anr.*, (2003) 5 SCC 315.

²³ 2008 (4) Mh. LJ 937.

²⁴ 2012 (1) Arb LR (Del) 253.

Bank of Saurashtra v Ashit Shipping Services (P) Ltd. & Anr.,²⁶ the petitioner contended that where a suit seeks damages, whether liquidated or otherwise, it will not be maintainable under the summary procedure of Order XXXVII and has to be tried as a regular suit. Counsel for petitioner contended that a breach of contract does not entitle a party to damages, it is only the determination of the Court that damage has incurred that entitles a party to damages. On this basis, it is contended that even if the contract provided for liquidated damages, unless the party proves in trial that it has indeed incurred damage and the extent of such damage, the Court cannot decree damages in favour of the said party. It was further contended that the amount specified in the contract is not a genuine pre-estimate of the likely damage that may arise from a breach of the condition, but is a stipulation *in terrorem* and the petitioner ought to have been granted an opportunity to disprove the respondent's claim for damages in trial.

As to fraud

28. Before this Court adverts to its analysis of this contention, it must be noted that the petitioner had raised an additional contention on merits; that the contract is not valid or binding, having been induced by fraud. The petitioner both before the Trial Court as well as before this Court contended that the contract is unenforceable as it was vitiated by fraud. The fraud, according to the petitioner, lay in the fact that the deed of 16th June, 2010 whereby he bound himself to work

²⁵ Order dated 17th November, 2011 in RFA 596 of 2002.

²⁶ (2002) 4 SCC 736.

for the petitioner for five years was admittedly to be executed after the contract subsumed in the letter of offer. Inasmuch as the letter of offer was accepted by the petitioner only on 19th June, 2010, the deed of 16th June, 2010, being prior to the letter of offer, was obtained by fraud. The contention, curious as it is, inspires no confidence in this Court.

29. Fraud, undeniably, vitiates all, including even decrees of Courts.²⁷

However, this Court recollects the *dictum* of LORD ATKIN, speaking for the Judicial Committee of the Privy Council in an appeal from the High Court of Judicature at Rangoon, when he warned that *[f]raud...like any other charge of a criminal offence, whether made in civil or criminal proceedings, must be established beyond reasonable doubt*, and a finding of fraud cannot be based on suspicion or conjectures.²⁸ That an allegation of fraud requires particulars of the fraud to be pleaded in detail is the well settled position in law, which is consistently followed by the Courts.²⁹ In the present case, the only allegations were that (a) the deed of 16th June, 2010 was to be executed *after* the contract/letter of offer but was signed *before* the latter, and (b) the letter of offer was signed by the respondent on 16th June, 2010 but was given to the petitioner only on 19th June, 2010 for his signature.

²⁷ *SP Chengalwaraya Naidu (dead) by LRs v Jagannath (dead) by LRs & Ors.*, (1994) 1 SCC 1; *AV Papayya Sastry & Ors. v Govt. of AP & Ors.*, (2007) 4 SCC 221.

²⁸ *ALN Narayanan Chettyar & Anr. v Official Assignee of the High Court, Rangoon & Anr.*, (1941) 54 LW 606 : AIR 1941 PC 93.

²⁹ *Tom Boevy Barrett v African Products Ltd.*, (1929) 29 LW 72 : AIR 1928 PC 261; *Bharat Dharma Syndicate Ltd. v Harish Chandra*, (1936-37) 64 IA 143 : AIR 1937 PC 146; *Bishundeo Narain & Anr. v Seogeni Rai and Jagernath*, 1951 SCR 548 : AIR 1951 SC 280, at para. 25, p. 283; *Union of India v Pandurang Kashinath More*, AIR 1962 SC 630, at paras. 10-12 *et. seq.*, p. 633; *Svenska Handelsbanken v Indian Charge Chrome & Ors.*, (1994) 1 SCC 502, at para. 41, p. 517; *AC Ananthaswamy & Ors. v Boraiah (dead) by LRs.*, (2004) 8 SCC 588, at para. 5-6, p. 590; *Mahatma Gandhi Sahakara Sakakare Karkhane v National Heavy Engg. Coop. Ltd. & Anr.*, (2007) 6 SCC 470, at para. 25, p. 481.

30. These limited averments and pleadings cannot be regarded as making out a case of fraud. It has not been the contention of the petitioner that the respondent had concealed, whether actively or otherwise, the nature of or the contents of the deed of 16th June, 2010 from the petitioner before the same was signed. It has not been the case of the petitioner that the respondent had actively misrepresented to him as to the nature of or the contents of the said deed before the same was signed. Even assuming these to be true, the petitioner has not given any explanation as to why he has not taken any action or initiated any proceedings to have the said documents – alleged to have been obtained by fraud – declared as null and void. Further, the petitioner has offered no explanation as to what steps he took to ascertain the nature of and/or the contents of the documents he executed, whether prior to executing or subsequent thereto. It is well settled that where a person on whom fraud is committed is in a position to discover the truth by ordinary diligence, fraud is not proved.³⁰ Further, it is not the case of the petitioner that he has been under any disability since the day he executed the documents that prevented him from challenging the same, nor can it be so assumed, given the averments in the present petition. In the circumstances, these allegations have to be regarded as being of no consequence in the eyes of law and the observation of the Trial Court in the impugned order – to the effect that there is no explanation from the petitioner as to his having broken the contract – has to be understood in this context. The Trial

³⁰ Proviso to section 19 of the Act; *Shri Krishnan v Kurukshetra University*, (1976) 1 SCC 311, at para. 7, p. 316.

Court thus considered only the issue raised in law as set out earlier, considering the Application as raising a mere demurrer and admitting the facts averred in the plaint for want of non-traverse. This Court finds no infirmity in this approach and is of the view that the Application has indeed not denied the factum of the petitioner having broken the contract – nor has the present petition.

As to maintainability

31. Thus bringing up the first issue of law that the petitioner has raised that where damages are claimed, the suit is not maintainable under Order XXXVII. The Supreme Court has consistently held that breach of a contract does not *eo instanti* give rise to a claim of or a right to a decree of damages *sans* any proof of damage.³¹ Indeed, it was on this basis that the Supreme Court, in the case of *State Bank of Saurashtra v Ashit Shipping Services (P) Ltd. & Anr.*³² – which was relied upon by the petitioner – held that since the dispute involved an indemnity, which indemnity required proof of actual loss before invocation, a summary suit will not be maintainable.

32. However, the Court cannot lose sight of the express provision of the statute; section 74 of the Act, as amended, provides:

“74. Compensation for breach of contract where penalty stipulated for.— When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual

³¹ *Fateh Chand v Balkishan Dass*, (1964) 1 SCR 515 : AIR 1963 SC 1405, at para. 10, p. 1411; *Maula Bux v Union of India*, (1969) 2 SCC 554, at para. 6, p. 559; *Union of India v Rampur Distillery and Chemical Co. Ltd.*, (1973) 1 SCC 649, at para. 4, p. 651; *Union of India v Raman Iron Foundry*, (1974) 2 SCC 231, at para. 11, pp. 243-244; *Oil & Natural Gas Corporation Ltd. v Saw Pipes Ltd.*, (2003) 5 SCC 705.

³² *Supra*, at n. 26, para. 14, pp. 741-742.

damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.
(Emphasis supplied)

33. The provision, doubtless, does not do away with the requirement of proof of damage or loss arising out of the breach of contract; what it does away with is the requirement of proving the *actual damage or loss*, i.e., the quantum of damage or loss arising out of the breach of the contract.³³ It cannot be stated that where some damage or loss has been shown to arise from the breach of the contract, the plaintiff ought nonetheless to prove the extent of loss, in all cases. This was explained by the Bench of three judges of the Supreme Court in the case of *Maula Bux v Union of India*,³⁴ where JC SHAH J. (who was then acting as the Chief Justice of India), speaking for the Bench, observed:

“...It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression “whether or not actual damage or loss is proved to have been caused thereby” is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.”
(Emphasis supplied)

³³ *Fateh Chand v Balkishan Dass*, *supra* at n. 31, para. 10, p. 1411.

³⁴ *Supra*, at n. 31, para. 6, p. 559.

34. Thus, the contention of the petitioner that in the case of claim for liquidated damages, a suit under Order XXXVII will not be maintainable *per se* has to be rejected. In a case where damage or loss arising out of the breach of contract is admitted, but a dispute arises only as to the quantum of the loss, a suit would certainly be maintainable under Order XXXVII if the contract provides for liquidated damages. However, should the defendant raise a triable issue as to whether the amount specified in the contract is a reasonable and genuine pre-estimate of loss or damage likely to arise as a result of the breach or a stipulation *in terrorem*, the suit would no longer be maintainable under Order XXXVII of the Code, and ought to be tried as a regular suit and the defendant ought to be granted leave to defend. This view finds support in two decisions of two learned Single Judges' decisions in the past.³⁵ This Court must, however, hasten to add that in both judgements, it appears from the report that the factum of damage or loss arising out of breach of contract was undisputed owing to non-traverse of the averments in the plaint, and ought to not be regarded as precedents for any other circumstance.

35. The other judgements cited by the petitioner do not dispute this position of law. The judgement of the Bombay High Court was one where the defendant specifically denied the actual damage or loss to the plaintiff.³⁶ The judgement of the Division Bench of this Court

³⁵ *Ishwar Dass v Harbans Singh*, 1994 (3) 108 PLR (Del) 37, at para. 10, p. 39; *Pritam Singh Dhingra v Ambadipudi Uma Sambamurthy*, (1984) 7 DRJ 150, at para. 32, p. 156.

³⁶ *Karim Hussainali Wajawalia & Anr. v Origin Information Technology (India) Ltd.*, *supra*, at n. 23, para. 2, p. 938 and para. 5, p. 939.

was in respect of a challenge to an arbitral award, where the Court was discussing the nature of a claim for liquidated damages. Even in the said judgement, the Division Bench observed that the arbitrator was competent to consider the *issue of sufferance of any damages whatsoever*,³⁷ a proposition accepted by the Supreme Court in *Maula Bux v Union of India*.³⁸ The judgement of the learned Single Judge of this Court in *Sipca India Ltd. v Manas Pratim Deb*,³⁹ was a matter where the amount specified in the contract was regarded as a penalty in its own peculiar circumstances, in a regular suit and hence not of relevance in the present matter.

36. In the instant case, the only contention raised by the petitioner in his Application against the averment of the plaintiff incurring damage or loss due to the breach is as under:

“ 5) That without prejudice to the submissions made herein above, even otherwise also, the Plaintiff in para 9 of its Complaint states that the Defendant is liable to tender the Plaintiff Company the sum of Rs. 5,00,000/- on account of recruiting, placing and training the Defendant. In this regard, it is most respectfully submitted that the Plaintiff in law, cannot demand any sum without proving in evidence the extent of expenditure as stated so. The demand of Rs. 5,00,000/- by the Plaintiff is allegedly on account of the expenses incurred by it in recruiting, placing and training. Hence, no decree can be passed unless these criteria are filed and proved in evidence before the Hon’ble Court.

37. It is evident from the above that the petitioner has not disputed the expenditure by the respondent in respect of recruiting, placing and training the petitioner. The petitioner, to the contrary, has admitted, for want of traverse, to having received the stipends paid by the

³⁷ *Vishal Engineers & Builders v Indian Oil Corporation Ltd.*, *supra* at n. 24, at para. 37, p. 267.

³⁸ *Supra*, at n. 31, para. 6, p. 559.

³⁹ *Supra*, at n. 25.

respondent, as well as having been recruited, placed, and having partially attended training at the expense of the respondent. All that the petitioner has contended is that the respondent cannot, in law, demand any sum without proving the extent of expenditure as claimed. This, to the mind of this Court, is doubtless, a demurrer on the issue of damage and damages therefor. Given the same, the matter falls squarely within the ambit of the precedents above cited, as to maintainability of a suit for liquidated damages under Order XXXVII of the Code. Thus, the challenge of the petitioner of the impugned order on this ground fails as well.

As to penalty and liquidated damages

38. This brings up the last of the issues raised by the petitioner: that the amount of ₹ 5,00,000/- (Rupees five lakh only) is not a genuine pre-estimate of likely damage arising out of breach of the contract. On this ground, this Court is of the view that the petitioner's case ought to succeed. The *locus classicus* as to section 74 and stipulations as to damages *qua* liquidated damages is the judgement of JC SHAH J. (as he then was) in *Fateh Chand v Balkishan Dass*,⁴⁰ where, speaking on behalf of five judges of the Supreme Court, he observed:

“8. ...The section is clearly an attempt to eliminate the sometime elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules

⁴⁰ *Supra*, at n. 35, p. 1410-1411.

and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.

...
10. ...*The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case...*"

39. It was this position of law that was subsequently further explained in *Maula Bux v Union of India*,⁴¹ as set out earlier. The law, thus, is amply clear: that the Court has the duty, when confronted with a case of contractual stipulation of damages, to ascertain whether the same is a genuine and reasonable pre-estimate of the damage or loss likely to arise due to breach or a stipulation *in terrorem*, i.e., a penalty. The Trial Court, in the impugned order undertook this exercise, considered the provisions of the contract and concluded that the amount of ₹ 5,00,000/- (Rupees five lakh only) is indeed a genuine and reasonable pre-estimate of the damage or loss likely to arise due to a breach of the contract. Ordinarily, this Court would be loath to interfere in issues of interpretation of contracts and other documents. If the interpretation given by the Trial Court is a reasonable interpretation, this Court would refuse to interfere with the same, even if it was of a different opinion.

40. However, in the instant case, this Court is of the view that the view of the Trial Court is contrary to the material available on record. The Trial Court observed that since the respondent has expended time and money in the selection process, payment of stipend, procuring

⁴¹ *Supra*, at n. 31, para. 6, p. 559.

admission, paying educational expenses, and has lost the expected services of the petitioner for a period of five years, and hence the amount of ₹ 5,00,000/- (Rupees five lakh only) can be regarded as liquidated damages, and not by way of a stipulation *in terrorem*. It observed that it is not disproportionate to the loss likely to have arisen to the respondent. In such circumstances and based on its said observations, the Trial Court, by the impugned order, refused to set aside the decree already granted in favour of the respondent.

41. However, the Trial Court has failed to consider the fact that under the terms of the letter of offer, the amount of ₹ 5,00,000/- (Rupees five lakh only) is payable by the petitioner in the following eventualities:

41.1. In case the petitioner fails to serve the respondent for a period of five years from the date of joining the course at the institution.

41.2. In case the petitioner is dismissed by the respondent itself for *serious misconduct*.

41.3. In case the petitioner fails to obtain the minimum percentage of marks or obtain the Diploma for any other reason.

41.4. In case anything adverse is received from the institution in respect of the petitioner's conduct or discipline and he is expelled from the course.

41.5. In case he is expelled from the course for any or no reason otherwise.

41.6. In case any declaration or information furnished by the petitioner is found false or incorrect.

41.7. In case any material information is found to have been wilfully suppressed by the petitioner.

41.8. In case his candidature is terminated for either of the above two reasons.

41.9. In case his candidature is terminated for any or no reason otherwise.

42. In addition to the above, the deed of 16th June, 2010 further provides that he shall forfeit the amount of ₹ 5,00,000/- (Rupees five lakh only) if he either (a) abandons, fails to report for, or does not secure the minimum percentage in the course for obtaining the Diploma, or (b) fails to join duty or resigns from employment of respondent or is terminated from service for *any kind of misconduct* within five years from the date of joining the course.

43. Apart from being onerous, the terms of the letter of offer as well as the deed make no distinction between the amount payable if the petitioner leaves the employ of the respondent of his own volition or if the petitioner is dismissed for *any or no reasons* whatsoever. Nor does it make any distinction between the amount payable if the contract is broken immediately or at a later stage, such as after four and a half years, for instance. The contract, essentially, provides that even if the respondent were to break the contract by dismissing the petitioner for any wrong reason, the petitioner would be liable to pay to the respondent an amount of ₹ 5,00,000/- (Rupees five lakh only), if the

dismissal were to occur before the expiry of the said five years. To indulge in *reductio ad absurdum*, the terms of the letter of the offer could be interpreted to the extent that if the petitioner were to expire even due to the respondent's fault, prior to the expiry of the said five years, the heirs and estate of the petitioner would be liable to pay the amount of ₹ 5,00,000/- (Rupees five lakh only) to the respondent.

44. Given the above, the amount of ₹ 5,00,000/- (Rupees five lakh only) cannot, by any stretch of imagination, be regarded as a genuine pre-estimate of the damage or loss likely to arise from a breach of the contract. The stipulation is a penalty calculated to instil fear in the mind of the petitioner of the adverse consequences of leaving the employ of the respondent; it cannot be considered as liquidated damages. In the circumstances, it is doubtless that the petition ought to succeed on this ground, and in view of the fact that the petitioner was served a second summons on 20th December, 2011. Accordingly, the impugned order, as well as the decree are liable to be and are thus set aside.

45. However, it would not be just or equitable to grant the petitioner unconditional leave to defend in the circumstances of the case. The petitioner has, as discussed, admitted to having broken the contract. The petitioner has further admitted to the factum of the respondent having incurred expenses on his behalf, towards stipend and for training. In the circumstances, the petitioner ought to be granted leave to defend only on the issue of quantum of damages to be paid

to the respondent for the breach of the contract subsumed in the letter of offer.

46. In the above circumstances, and subject to the conditions in paragraph 43 and the present paragraph, the petition is allowed. The leave to defend shall be conditional upon the petitioner depositing with the Trial Court an amount of ₹ 1,00,000/- (Rupees one lakh only) within a period of four weeks from today. The Trial Court shall pass appropriate directions for investing the said amount in appropriate interest bearing deposits pending decision of the Suit. The petitioner shall file his Written Statement, alongwith his list of documents, in the Trial Court, within a period of thirty days from the date of this order. List the matter before the Trial Court on 4th July, 2014 for further directions. The records of the Trial Court shall be returned within a period of ten days if not already done.

NAJMI WAZIRI
(JUDGE)

MAY 28, 2014