

**GOBINDA CHANDRA NANDY VS. GOUR
CHANDRA NANDY & ORS.**

Mr. Tanmoy Mukherjee
Mr. Subham Ghosh
Mr. Khaza Rahim Ahmed
..for the petitioner
Mr. Sayan Sinha
Mr. Ayanavo Bhattacharya
Mr. Mainak Swarnokar
..for the O.P.1

This revisional application has been filed by the defendant no.1 in Title Suit No.80 of 2007, pending before the learned Civil Judge(Junior Division) 7th Court, Howrah, being aggrieved by the order dated March 4, 2020.

By the order impugned, the learned Court below rejected the application filed by the defendant no.1/petitioner for vacating the order fixing the suit for ex parte hearing upon acceptance of the show-cause as also the written statement.

It is the contention of the petitioner that the summons were never served upon the petitioner. Certified copy of the report of the process server dated December 19, 2009 has been filed before this Court. From which, it appears that the defendant no.1 was not available at the address and as such the defendant

no.2, the proforma defendant in this suit, was served with a copy of the summons on behalf of the defendant no.1. According to the process server, they were closely related. Admittedly, from the process server's report, it appears that the defendant No.1 was not served. The defendant no.2 in the suit was served with the summons, who accepted the same on behalf of the defendant no.1. On the basis of the report, the learned Court below observed by an order dated February 8, 2020 that the summons had been duly served.

Mr. Tamoy Mukherjee, learned Advocate for the petitioner submits that had the defendant no. 2 and the defendant no.1 were not in good terms and were not residing together in the same household. The service of summons could have been accepted as good service under Order 5 Rule 15 of the Code of Civil Procedure, only if they were living together in a common mess.

In this case, admittedly the records would reveal that the defendant no.2 and the defendant no.1 are not in good terms and both the defendant no.2 and the plaintiff had filed independent suits, who are brothers of the defendant no.1, against the defendant no. 1 challenging a deed of gift executed by their father. Although Mr. Ayanavo Bhattacharya urges that the service upon the brother should be considered as a

good service under Order 5 Rule 15 of the Code of Civil Procedure, I do not accept such contention, inasmuch as, when the parties are litigating against each other and not residing together in the same house, service upon the defendant No.2 under facts of the case, cannot be accepted as good service.

In this case, the process server ought to have followed the procedure laid down under Order 5 Rule 17 of the Code of Civil Procedure. Order 5 Rule 17 of the Code of Civil Procedure provides that if neither the defendants nor the authorized agent of the defendants were available for service, the summons should have been affixed at a prominent place. A report to that effect should be returned to the Court and on receiving such report it would be the duty of the Court to examine the process server in order to satisfy itself that such summons were served in terms of Order 17, Rule 19. Unfortunately, in this case, the Court proceeded on the basis that service upon one of the brothers would be a good service. The learned court failed to consider the facts in this case and passed the order impugned. Moreover, service upon an agent can be done only if there is an authorization. Records reveal that the plaintiff being unable to obtain an ad- interim order of injunction, had preferred a misc. appeal and there was a paper publication with

regard to the said proceeding and coming across the said paper publication, the petitioner contested the said misc. appeal. The said paper publication was made on January 22, 2017. The Misc. appeal was disposed of on March 20, 2019. The petitioner contested the misc. appeal and thereafter the lower court records were sent back to the learned trial judge. On June 21, 2019, the petitioner filed the written statement, an application for vacating the order fixing the suit for ex parte hearing along with a show cause for acceptance of the written statement. There is nothing contrary to the facts as stated hereinabove borne out by the records.

Under such circumstances, this Court is of the opinion that once the defendant no.1, who is the principal defendant, contested the misc. appeal upon seeing the newspaper insertion and has filed the written statement along with the above explanation as soon as the appeal was dismissed upon contest, it cannot be said that the defendant no.1 did not have cogent reason for not filing the written statement within the period fixed by the learned Trial Court. The summons were not served in accordance with law. Although, the suit is of 2007, the suit has not progressed, even up to the stage of hearing of the injunction application. Thus, it is not the case that at

a very advanced stage of the suit, the defendant no.1 was filing the written statement.

The defendant no. 1, who contested the appeal filed by the plaintiff resulting in the dismissal of the appeal cannot be as a litigant who intentionally delayed the progress of the suit, by sheer negligence or lack of diligence. The reasons aforesaid are sufficient to explain the exceptional situation which warrants interference by this court, upon setting aside the order impugned. The order dated February 8, 2010 fixing the suit for ex parte hearing is set aside, the show cause and the explanation given by the defendant no.1 are accepted. The order impugned dated March 4, 2020 is quashed and set aside.

The petitioner is directed to compensate the plaintiff by payment of cost of Rs.1,000/- in cash by handing over the same to the learned Advocate-on-record for the plaintiff. Receipt showing such payment shall be handed over to the learned Advocate-on-record for the defendant no.1/petitioner by the learned Advocate on record for the plaintiff. Such receipt shall be deposited in the learned Court below and once such receipt is deposited the learned Court below will accept the written statement. Such payment is to be made within 10 days from date. In case of default, the suit will continue ex parte.

The learned Court below is directed to accept the written statement and thereafter proceed with the suit in accordance with law.

This revisional application is disposed of.

Urgent photostat certified copy of this order be given to the parties on priority basis, if the same is applied for.

(Shampa Sarkar,J.)

