

IN THE HIGH COURT AT CALCUTTA
(CIVIL REVISIONAL JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CO 3202 of 2007
CAN 3 of 2019 (Old No. 1440 of 2019)
CAN 4 of 2019 (Old No. 1441 of 2019)

NIKHIL KR. CHATTERJEE
VS.
SAMIR KR. CHATTERJEE

For the Petitioner : Mr. Kushal Chatterjee, Adv.
Mr. O. Chatterjee, Adv.

For the O.P. : Mr. Debyeet Mukherjee, Adv.
Mr. S. Chatterjee, Adv.
Mr. S. Mohan Shah, Adv.
Mr. P. Pal, Adv.

Hearing concluded on : 31st July, 2023

Judgement on : 1st August, 2023

Siddhartha Roy Chowdhury, J.:

1. This application challenges the order dated 21st July, 2007, passed by learned Additional District Judge, Barrackpore, in Misc. Appeal No. 56 of 2007, affirming the Order No. 48 passed by learned Trial Court in Title Suit No. 177 of 1998.
2. Briefly stated, the petitioner is a premises tenant under the opposite party in respect of a shop room at premises no. 53/50 Kali Charan Ghosh Road at a monthly rental of Rs. 140/- payable according to English Calendar month. The opposite party landlord filed a suit for his eviction. It is alleged that summon was not served upon the petitioner.

Being informed by one of his well-wishers, the petitioner came to know about the proceeding. He engaged an Advocate and after obtaining information slip that the suit was decreed on 7th November 2000. The petitioner filed an application under Order IX Rule 13 of the Code of Civil Procedure which was dismissed by learned Trial Court, overlooking the fact that no summon was served upon the petitioner. Feeling aggrieved by the order of learned Trial Court the petitioner preferred an appeal before the learned Additional District Judge, which was registered as Miscellaneous Appeal No. 56 of 2007. But the appeal was not accepted and dismissed. Hence this lis.

3. Mr. Kushal Chatterjee, learned Counsel for the petitioner submits that the petitioner had no notice of institution of the suit and therefore was precluded from entering into appearance to contest the suit. It is contended that learned Trial Court committed jurisdictional error in rejecting the prayer of the petitioner, so made in the proceeding under Order IX Rule 13. Mr. Chatterjee invites the attention of the Court to the provisions as laid down under Order V Rule 9, 16, 17, 18 and 19 of the Code of Civil Procedure and submits that the provisions thereof had been followed by learned Trial Court, in the breach, rendering thereby the order impugned vulnerable, which even the learned Appellate Court failed to appreciate. It is vehemently argued that under Order IX Rule 6 of the Code of Civil Procedure it is mandatory to prove that the summon was duly served upon the petitioner/defendant following the procedure laid down under Order V Rule 16, 17, 18, 19 of the Code of Civil Procedure. The provision of Order V Rule 17 of Civil Procedure Code was not followed by the process server and also there was no compliance of Rule 19.

According to Mr. Chatterjee procedural law laid down under Order V Rule 17 and Rule 19 of the Code of Civil Procedure are mandatory in nature for the purpose of proving the due service of summon. To buttress his point Mr. Chatterjee relies upon the decision of the Court and Bench of this Court pronounced in ***Shiba Prashad Saha vs. Gordon Mohon Saha*** reported in **(2011) 4 CHN 195** and the judgement of Hon'ble Apex Court in ***Sushil Kumar Savarwal vs. Gurpreet Singh & Ors.*** reported in **(2002) 5 SCC 377**. It is further submitted by Mr. Chatterjee that in the case at hand the postal peon made an endorsement that he visited the address of the petitioner for couple of days and ultimately the article was refused. While the narrative of the process server in his report is different. The report of the process server should be given precedence over the report of the postal authority, as held by Hon'ble Apex Court in the case of ***Salem Bar Association vs. Union of India*** reported in **(2005) 6 SCC 344**.

4. It is contended further by Mr. Chatterjee that when the petitioner submitted before the learned Trial Court on oath that no summon was served upon him, learned Trial Court should have refused to accept the report of the process server as it was not supported by an affidavit. In view of the judgement of Hon'ble Supreme Court pronounced in the case of *Sushil Kumar Shabharwal (supra)* the onus was upon the opposite party/plaintiff to prove the due service but learned Trial Court committed jurisdictional error by shifting the burden upon the petitioner defendant.
5. It is adverted that learned Trial Court had no reason to post the suit for ex parte hearing when summon was not duly served. Drawing my attention to Order No. 8 dated 9th August 1999, Mr. Chatterjee submits

that the summons served through Court was found to be not satisfactory and on the adjourned date learned Trial Court accepted both the services to be satisfactory. Learned Trial Court committed error in invoking the provision of Rule 6 of Order IX of the Code of Civil Procedure, when the Court was not satisfied with the service of summon. According to Mr. Chatterjee the order impugned suffers from grave jurisdictional error and warrants interference of this Court.

6. Per contra Mr, Debyeet Mukherjee, learned Counsel representing the opposite party submits that summon was directed to the defendant, who is the petitioner before this Court, through process server as well as by registered post with acknowledgement due. The process server had served the notice affixing the summon on the entrance door of the suit room in presence of witnesses. Such report was duly certified by the concerned Nazir of the Court in compliance with the provision of Order V Rule 19 A of the Code of Civil Procedure and it was duly accepted by the learned Trial Court. The report of the process server demonstrates that the defendant after understanding the contents of the summon refused to accept the same. The process server had to leave the summon on the door of the suit room and the entire incident took place in presence of Sri, Kamalendu Mukherjee and Haradhan Sana. On 6th August, 1999 the Nazir of the Court verified the declaration made by the process server in compliance with the provision of Order V Rule 19 A of the Code of Civil Procedure, as amended by this Court.
7. According to Mr. Mukherjee, the summon was sent under a registered post to the address of the petitioner/defendant and it was duly stamped. The postal peon returned the envelope with the endorsement 'refused'.

The petitioner in the proceeding under Order IX Rule 13 of the Code of Civil Procedure did not deny the correctness of the address given on the postal envelope. It is contended that when the petitioner never contested that the envelope was not properly addressed and it was not properly stamped, under Section 27 of the General Clauses Act, it is to be presumed that postal article had reached its destination. Service was effected as the addressee refused to accept the summon. To buttress his point Mr. Mukherjee places reliance upon the judgement of Hon'ble Supreme Court in the case of **Basant Singh & Anr. vs. Roman Catholic Mission** reported in **(2002) 7 SCC 531** and in the case of in the **Indu Bhushan vs. Munna Lal & Anr.** reported in **(2007) 14 SCC 42**.

8. It is contended by Mr. Mukherjee that the order impugned does not manifest any jurisdictional error or perversity, therefore, the order impugned does not merit any interference.
9. To appreciate the issue it is expedient to go through the provisions of Order V Rule 9, 16, 17, 18, 19 and 19 A of the Code of Civil Procedure.

“9. Delivery of summons by Court. - (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper officer to be served by him or one of his subordinates or to such courier services as are approved by the Court.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him in such manner as the Court may direct.

(3) The services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgment due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the High Court or by the Court referred to in sub-rule (1) or by any other means of transmission of documents (including fax message or electronic mail service) provided by the rules made by the High Court:

Provided that the service of summons under this sub-rule shall be made at the expenses of the plaintiff.

(4) Notwithstanding anything contained in sub-rule (1), where a defendant resides outside the jurisdiction of the Court in which the suit is instituted, and the Court directs that the service of summons on that defendant may be made by such mode of service of summons as is referred to in sub-rule (3) (except by registered post acknowledgment due), the provisions of rule 21 shall not apply.

(5) When an acknowledgment or any other receipt purporting to be signed by the defendant or his agent is received by the Court or postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee or by any person authorised by the courier service to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to accept the summons by any other means specified in sub-rule (3) when tendered or transmitted to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant :

Provided that where the summons was properly addressed, pre-paid and duly sent by registered post acknowledgment due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgment having been

lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of issue of summons.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of courier agencies for the purposes of sub-rule (1).

16. Person served to sign acknowledgement. - Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgement of service endorsed on the original summons.

17. Procedure when defendant refuses to accept service, or cannot be found. - Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgement, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

CALCUTTA : ANDAMAN AND NICOBAR ISLANDS. - Substitute the following:

Rule 17. - Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person upon whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain and shall then return the original to the Court from which it was issued with a report Ordered thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed." (w.e.f. 25-7-1928)

18. Endorsement of time and manner of service. - The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

19. Examination of serving officer. - Where a summons is returned under Rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

CALCUTTA : ANDAMAN AND NICOBAR ISLANDS. - Substitute the following:

“Rule 19. – Where a summons is returned under Rule 17, the Court shall, if the return under that rule has not been verified by the declaration of the serving officer, and may, if it has been so verified, examine the serving officer, on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit, and shall either declare that the summons has been duly served or order such service as it thinks fit.” (25-7-1928)

19A. Simultaneous issue of summons for service by post in addition to personal service. - (1) The Court shall, in addition to, and simultaneously with, the issue of summons for service in the manner provided in rules 9 to 19 (both inclusive), also direct the summons to be served by registered post, acknowledgement due, addressed to the defendant, or his agent empowered to accept the service, at the place where the defendant, or his agent, actually and voluntarily resides or carries on business or personally works for gain:

Provided that nothing in this sub-rule shall require the Court to issue a summons for service by registered post, where, in the circumstances of the case, the Court considers it unnecessary.

(2) When an acknowledgement purporting to be signed by the defendant or his agent is received by the Court or the postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons, when tendered to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed, prepaid and duly sent by registered post, acknowledgement due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgement having been lost or mislaid, or for other reason, has been received by the Court within thirty days from the date of the issue of the summons.

CALCUTTA : ANDAMAN AND NICOBAR ISLANDS. - Insert the following:

19-A. A declaration made and subscribed by a serving officer shall be received as evidence of the facts as to the service or attempted service of the summons.” (25-7-1928)”

10. When his attention is drawn to the amendments effected by this Court with regard to Rule 17, 19 and 19A, it is adverted by Mr. Chatterjee that Order VI Rule 15 of the Code of Civil Procedure enunciates that verification requires to be supported by an affidavit as well.
11. It is further contended that dictionary meaning of the word ‘verification’ is the formal declaration made in presence of an authorised officer by which one savoir to trust of statement in document. It means to confirm by oath or affidavit, to swear to the truth of the statement. (Wharton’s Concise Law Dictionary)
12. Order VI of the Code of Civil Procedure speaks about the pleadings in general. It has got nothing to do with the service of summon as laid down under Order V of the Code of Civil Procedure. The declaration of the process server on the overleaf of summon, duly endorsed by a Nazir, in view of the amended provision of Order 5 Rule 19 A of the Code of Civil Procedure, effected by this Hon’ble High Court on 25th July, 1928, is admissible as evidence. The postal peon in discharge of his official duty

made unsuccessful attempt to deliver the postal article to the addressee sent back the article to the sender with the endorsement 'refused'. Section 114 illustration (e) of the Evidence Act says that Court shall presume that the act in discharge of official business was performed regularly. The petitioner since wishes the Court to believe that summon was never tendered to him either by the process server or by the postal peon, onus to prove the same was upon him under Section 103 of the Evidence Act, 1872. The petitioner could have examined both the process server and the postal peon to rebut the presumption, arising out of the endorsement on the postal envelope by the postal peon and from the declaration of the process server, duly endorsed by Nazir under Rule 19A of the Code of Civil Procedure, as amended by Calcutta High Court. The petitioner has failed to discharge such onus. There is nothing to indicate that learned Trial Court did not comply with the provisions of Rule 6 of Order IX of the Code of Civil Procedure. The judgement pronounced in the case of *Siba Prasad Saha (supra)* on a factual matrix where no declaration duly verified was there, as envisaged in order V Rule 19 of the Code of Civil Procedure. In this case at hand, there is declaration as required to be made and such declaration was duly verified by Nazir. In the amended provision it is envisaged that where summon is returned under Rules 17, to the Court from which it was issued with a report endorsed thereon or annexed thereto stating, *inter alia*, that he has affixed the copy, the circumstances under which he did so, and the name and address of the person if any, by whom the house was identified and in whose presence the copy was affixed. Such declaration or statement if not verified then the Court may examine the serving office on oath. Even the Court can

direct further enquiry before declaring the summons had been duly served on the petitioner. As I have already pointed the declaration in this case by the serving officer has duly been verified by the Nazir.

13. In the other case, *Sushil Kumar Sabharwal (supra)* the process server did not affix the summons on the wall of the shop but while adducing evidence he claimed to have done so. His statement, therefore, found to be mutually contradictory. The fact of the case decided and the fact of the case at hand are not in pari materia.
14. It goes without saying that while exercising jurisdiction conferred under Article 227 of the Constitution of India this Court cannot exercise the power of an Appellate Court or interfere with the order impugned when there is no evidence to justify the said order. There is nothing on the face of the order to hold that the finding of learned Trial Court is so perverse that no man of ordinary prudence can possibly come to such conclusion which the learned trial court or learned Appellate Court has come to. The power of superintendence is not a power given to correct errors, otherwise, it would be tantamount to entertain appeals on law and fact.
15. In my humble opinion, the impugned order does not warrant any interference.
16. The revisional application merits no further consideration and is dismissed, however, without cost. Pending applications, if any, are also disposed of.
17. Let a copy of this judgement along with lower Court record be sent down to the learned Trial Court immediately.

18. Urgent photostat certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.