

Adonis India Vs. Ashu Electronics and Refrigeration

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SooperKanoon Citation : sooperkanoon.com/708968

Court : Delhi

Decided On : Aug-21-2009

Reported in : 162(2009)DLT222; (2009)156PLR10

Judge : S. Muralidhar, J.

Acts : Limitation Act - Sections 5; Code of Civil Procedure (CPC) - Sections 28 - Order 5, Rule 9 to 19 - Order 9, Rule 13 - Order 39, Rule 13

Appeal No. : CS (OS) 1043/1999

Appellant : Adonis India

Respondent : Ashu Electronics and Refrigeration

Advocate for Def. : P.K. Mittal, Adv.

Advocate for Pet/Ap. : Jayant Nath, Sr. Adv.,; Upender Thakur and; Anish Tandon

Judgement :

S. Muralidhar, J.

IA Nos. 6012 & 6014 of 2009 in CS(OS) No. 1043 of 1999

1. IA No. 6012 of 2009 is an application under Order IX Rule 13 CPC on behalf of the Defendant seeking the setting aside of the ex parte judgment and decree

dated 24th October 2002 passed by this Court in Suit No. CS (OS) 1043 of 2009.

2. The application has been accompanied by an IA No. 6014 of 2009 under Section 5 of the Limitation Act seeking condonation of delay in filing the application under Order IX Rule 13 CPC.

3. The aforementioned suit was filed by the Plaintiff seeking recovery from the Defendant of a sum of Rs. 10,42,459/- together with pendente lite interest @ 24% per annum from the date of filing of the suit till the realisation of the amount and the costs. By an order dated 14th May 1999 of this Court, summons to the Defendant were directed to issue returnable on 26th October 1999. Summons were directed to be served on filing of process fee as well as registered covers with acknowledgment due. On 26th October 1999 the learned Joint Registrar noticed that none is present for the Defendant despite service nor any written statement filed. The case was therefore directed to be listed before the Court. On 14th December 1999 a learned Single Judge after noticing that no one was appearing on behalf of the Defendant despite service set the Defendant ex parte. The matter was set down before the learned Joint Registrar again on 17th April 2000 for ex parte evidence. On 17th April 2000 and 26th September 2000 the case was adjourned since the Plaintiff had not filed affidavit by way of ex parte evidence. Thereafter the affidavit was filed and the case was listed for exhibiting of documents which was ultimately done on 13th September 2002. On 24th October 2002 a decree was passed in favour of the Plaintiff and against the Defendant for the sum together with interest as prayed for. A decree was also drawn up on that basis.

4. I.A. No. 6012 of 2009 under Order IX Rule 13 CPC was filed by the Defendant on 21st April 2009. The explanation offered in I.A. No 6014 of 2009, being an application seeking condonation of the delay in filing I.A. 6012 of 2009, is that the Court file was inspected on 30th March 2009 and there was nothing to suggest that the envelope containing the plaint and documents along with the process fee was filed by the Plaintiff for effecting service of summons pursuant to the order dated 14th May 1999 and that such envelope with summons was dispatched to the Defendant by registered post at the correct address. There was no evidence

that service had been effected by the postal authorities or whether the postal envelope had come back unserved. The file showed that a process server attached to the District Court at Ghaziabad had made an endorsement on the summons that he had visited the premises of the Defendant in Ghaziabad and that the summons were served on the Defendant. It is submitted that there was no order passed by the Court directing service of summons through the process serving agency of Ghaziabad. It is submitted that the said service was no service in the eye of law and therefore the ex parte judgment and the consequent decree is liable to be set aside. The Defendant in any event denies having received that summons.

5. It is stated in the application that on 25th March 2009 an Ameen from the Office of the District Court, Ghaziabad, UP visited E-34, Daya Nand Nagar, Ghaziabad, UP i.e. the premises of the Defendant and asked that the premises be vacated since the property was attached and auctioned under the orders of the Ghaziabad court. It is then upon enquiring, that the Defendant came to know of the ex parte judgment passed by this Court. Thereafter the applicant engaged an advocate who filed his vakalatnama in this Court on 26th March 2009. The suit file was thereafter inspected, the records traced and the present application was filed on 22nd April 2009.

6. The principal ground taken in I.A. 6012 of 2009, which is an application under Order XXXIX Rule 13 CPC for setting aside the ex parte order, is more or less the same. It is contended that the service of summons was not effected in the manner known to law and so the service report of the process server should be accepted as being correct.

7. In reply it is pointed out by the Plaintiff that Order IX Rule 13 CPC prescribes a limitation of 30 days for filing an application for setting aside an ex parte decree. Reliance is placed on the judgment in *Nai Dunia Urdu Weekly Newspaper v. P.O., Labour Court* : 137 (2007) DLT 234 to contend that where service is effected through a process server, the Court has to presume that all official acts have been done in a proper manner and mere denial of signatures cannot rebut the presumption of proper service. Reliance is also placed on the judgment in *Saroj*

Thakur v. Daulat Ram Kashyap 2007 V AD (Delhi) 349. It is submitted that the Defendant very well knew of the ex parte judgment which was apparent from the fact that the Defendant has been actively participating in the execution proceedings going on in the court of the Senior Civil Judge, District Court, Ghaziabad in Execution No. 30 of 2005. The order dated 27th July 2007 passed by the Senior Civil Judge, District Court, Ghaziabad has been enclosed with the reply. It is submitted that inasmuch as the Defendant was participating in the execution proceedings even in 2007, the Defendant is stopped from continuing that it came to know of the ex parte decree only in 2009 after attachment is ordered. In rejoinder to this reply it is reiterated by the Defendant that he came to know of the ex parte decree only on 29th March 2009 and the present application was filed on 22nd April 2009. It is denied that the Defendant was actively participating in the execution proceedings in the court of the Senior Civil Judge, District Court, Ghaziabad. The Defendant maintains that it did not execute any vakalatnama in favour of any advocate to appear in the Ghaziabad Court. An affidavit of one Mr. Praveen Chaudhary Advocate stating that he had never been engaged has been placed on record. In addition, learned Counsel for the Defendant relies upon the judgment of this Court in Bulganin v. Apex Apartments Pvt. Ltd. : 91 (2001) DLT 446.

8. The submissions of learned Counsel for the parties have been considered.

9. The Court record shows that there was no specific order for the summons to be transmitted to the process serving agency in Ghaziabad. Nevertheless there is a communication dated 30th June 1999 from the District Judge, Ghaziabad addressed to the Deputy Registrar (Judicial) of this Court enclosing the endorsed summons after service. Although in the said letter dated 30th June 1999 there are several columns like served personally, served sufficiently, not served, served in sufficiently, reported to be died, reported to have incomplete/left the address none of these columns are in fact tick marked. Accompanying this communication is a copy of the report of the process server. On the reverse of the summons of this Court there is a purported signature bearing the date 16th June 1999 over which is the writing in hand: received one court copy.. The name of the person whose signature it is is not mentioned below the signature. Considering that the

Defendant has been described in the plaint as a proprietorship concern, the absence of any rubber stamp of the said concern or the name of the proprietor is significant. The report of the process server of Nazarat Office, District Court, Ghaziabad dated 19th April 1999 which is in Hindi when translated states that the owner of the Defendant firm received the summons and affixed his signatures.

10. An important distinction between the facts on hand and the facts in Nai Dunia Urdu Weekly Newspaper is that there the summons which came back after service carried a stamp of Petitioner Management and some signatures. In the present there is no indication of the name of the person on whom the summons were served.

11. The relevant provisions for service of summons upon the Defendant who is residing outside the jurisdiction of this Court are Section 28 CPC and Order V Rule 9 CPC. At the relevant point in time when this Court directed summons to issue both on process fee and registered covers by its order dated 14th May 1999, the provision as amended in 2002 had not come into effect. The relevant provisions for service of summons upon Defendants through registered post in addition to service through process server was under Order V Rule 19A (which now stands repealed with effect from 2002) which reads as under:

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, acknowledgment 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, 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 other reason, has not been received by the Court within thirty days from the date of the issue of the summons.

12. This Court in *Bulganin* had occasion to consider the effect of a Plaintiff failing to take steps to have the summons served through registered post. In the said case there was a report of the process server stating that the Defendant had been served. The Defendant was then set *ex parte*. The Defendant later appeared and contended that the summons was not dispatched through registered post and therefore there was no service of summons. The Defendant there, as in the present case as well, contested the process server's report. It was observed by this Court in *Bulganin* that while it was possible for a Plaintiff to obtain a false service report from a process server, it would be far more difficult to obtain such report from a postman. Since the Plaintiff in that case failed to initiate the appropriate steps for service by registered post and the Defendant was served summons without the authority or direction of the Court, the *ex parte* order was set aside.

13. In the present case the Defendant has averred in para 9 of the application that it is not clear from the record whether any service of summons was effected on Defendant through postal service and/or as to whether the postal envelope had come back or served. A perusal of the record by this Court shows that this is indeed correct. There is nothing on record to show that the summons was dispatched by registered post and served or that the cover was returned unserved. There is no noting by the Registry in this regard. Only the report of the process server of the District Courts, Ghaziabad is on record. To this extent there is a similarity in the facts of the present case and those in *Bulganin*. It may be noticed that in reply to para 9 there is a mere denial by the Plaintiff without positively stating that in fact registered covers were filed in the court for service of summons

upon the Defendant through registered post. In that view of the matter this Court is of the view that the requirement of Order V Rule 19A CPC as it then stood was not complied with. Following the judgment in Bulganin the benefit of doubt must be given to the Defendant.

14. The question that then arises is when did the Defendant come to learn of the ex parte judgment? Although it is the case of the Plaintiff that the Defendant was participating in the execution proceedings, the affidavit of Mr. Praveen Chaudhary states that he was in fact not engaged by the Defendant to appear in the execution proceedings. Interestingly even the handwritten application in the execution petition, a copy of which is annexed to the Plaintiff's reply to the application under Order IX Rule 13 CPC, does not bear the signature of the Defendant. It cannot therefore be said that the Defendant was participating in the execution proceedings. It is not denied that pursuant to the attachment ordered by the executing court, the bailiff visited the Defendant's premises on 25th March 2009. The explanation offered by the Defendant that it then came to know of the ex parte order seems plausible.

15. At the hearing on 7th August 2009, learned Counsel for the Defendant stated that in order to demonstrate his bonafides and that he had not filed this application to frustrate the execution of the decree, the Defendant would be present in Court on the next date to make a statement and furnish an undertaking by way of an affidavit that he will keep the immovable property owned by him unencumbered during the pendency of the suit, if restored. The Defendant has filed an affidavit dated 11th August 2009 affirming that he owns immovable property at E-34, Daya Nand Nagar, Ghaziabad, UP land measuring 200 sq. yards with one and a half storey building and further undertaking that he will not sell, alienate, discharge, encumber the aforesaid property till the suit CS (OS) No. 1043 of 1999 is decided by the Hon'ble Court. Mr. Satya Bhushan Arya, the sole proprietor of the Defendant who is present in court identified by his counsel reiterates this undertaking.

16. Keeping in view the above facts and circumstances, it appears to this Court to be in the interests of justice to condone the delay in the Defendant filing the

application under Order IX Rule 13 CPC. IA No. 6014 of 2009 is accordingly allowed.

17. As far as I.A. 6012 of 2009 is concerned, the Defendant will comply with the following conditions:

(i) In terms of the undertaking given on affidavit, the sole proprietor for the Defendant Shri Satya Bhushan Arya S/o late Shri Karam Chand will keep the immovable property at E-34, Daya Nand Nagar, Ghaziabad, UP unencumbered during the pendency of the suit CS (OS) No. 1043 of 1999 [or any other fresh No. that may be given to it by the District Court to which the present suit will now stand transferred on account of the change in pecuniary jurisdiction]

(ii) The original titled deeds of the said property will be deposited in this Court within seven days from today and upon so being deposited will be placed in a sealed cover with proper identifications/markings

(iii) The Defendant will within seven days from today pay to the Plaintiff costs of Rs. 5,000 and place on record the proof of payment of costs.

If the conditions in (ii) and (iii) above are not complied with by the Defendant within seven days, I.A. No. 6012 of 2009 will stand dismissed. If they are complied with as directed, then I.A. 6012 of 2009 will stand allowed subject to the conditions (i) to (iii) above and the ex parte judgment and decree dated 24th October 2002 passed by this Court shall stand set aside and CS (OS) No. 1043 of 1999 shall stand restored to file. I.A. 6012 of 2009 is accordingly disposed of.

I.A. No. 6013 of 2009 (for stay of execution proceedings)

18. In view of the above order, and subject to the compliance by the Defendant with the directions in para 14, the execution proceedings do not survive. The application is accordingly disposed of.

CS(OS) No. 1043 of 1999

19. Subject to the Defendant complying with the directions in para 14, Suit CS (OS) No. 1043 of 1999 shall stand restored to file. Since the suit is for recovery of

a sum of Rs. 10,42,459/- together with interests and costs it will stand transferred to the Court of the learned District Judge for being assigned to the appropriate court for further proceedings. The case (together with the entire records and the sealed cover containing the original title papers of the property of the Defendant) will be placed before the learned District Judge for orders on 14th September 2009.

20. The Defendant undertakes that written statement will be filed by him within four weeks thereafter. In that event, rejoinder be filed within two weeks thereafter. Documents also be filed together with the pleadings by the parties within the same period. It is made clear that no further adjournment will be granted for that purpose. The defendant has undertaken before this Court that he will cooperate to ensure that the trial is concluded within a period of one year from the date of its transmission to the concerned court. The trial court is requested to endeavour to conclude the trial and deliver final judgment within one year of the case being transmitted to it.

21. The original title deeds of the immoveable property of the defendant will stand deposited with the court till the conclusion of the trial when appropriate orders will be passed in that regard by the concerned court.