

Aar Kay Traders Vs. Satish Electronics

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Court : Himachal Pradesh

Decided On : Aug-21-2008

Reported in : 2008(3)ShimLC44

Judge : Deepak Gupta, J.

Appellant : Aar Kay Traders

Respondent : Satish Electronics

Advocate for Def. : Shri. Janesh Gupta

Advocate for Pet/Ap. : Shri. Vikas Bhardwaj

Judgement :

Deepak Gupta, J.

1. This petition under Article 227 of the Constitution of India is directed against the order of the Civil Judge (Jr. Div), (I), Dharamsala dated 23.5.2007 whereby he has allowed the application filed by the respondent, hereinafter referred to as the defendant, and set aside the ex-parte proceedings. While doing so, the learned trial Court has held that on a conjoint reading of Order 5 Rules 9 and 21 CPC, the Court can order service by registered post acknowledgement due only if the defendant resides within the territorial jurisdiction of that Court.

2. Briefly stated the facts of the case are that the petitioner, hereinafter referred to as the plaintiff, instituted a suit on 22.2.2005 for recovery of Rs. 62,620 along with interest in the Court of Senior Sub Judge, Kangra at Dharamsala, who assigned this case to the Court of Civil Judge (Jr. Div) I, Kangra at Dharamsala. The respondent hereinafter referred to as the defendant, resides at Jawali which admittedly falls outside the territorial jurisdiction of the Court at Dharamsala. On 7.7.2005, the trial Court in its order recorded that the registered AD sent to the defendant had been received back with an endorsement of the postal authority that the defendant had refused to receive the same and, therefore, the defendant was deemed to be served in terms of Order V, Rule 9 CPC. The defendant was accordingly proceeded ex parte and the ex parte evidence of the plaintiff was recorded. Thereafter when the case was listed for arguments, the defendant filed an application under Order IX Rule 7 CPC for setting aside the ex parte proceeding.

3. Vide the impugned order dated 23.5.2007 the learned Civil Judge has allowed the said application. One of the grounds which has weighed with the learned Civil Judge while allowing the said application is that on a conjoint reading of Order V, Rules 9 and 21, service of the defendant who resided outside the jurisdiction of the trial Court could not have been ordered by registered post acknowledge due. Resultantly, even if the defendant had refused to accept the summons sent by registered post, he could not be deemed to be served in accordance with law and could not have been proceeded ex parte.

4. I have heard Shri Vikas Bhardwaj, learned Counsel for the petitioner and Shri Janesh Gupta, learned Counsel for the respondent who have rendered able and valuable assistance to this Court.

5. An important question arises in this petition with regard to the interpretation of Order V, Rules 9 and 19 CPC after their amendment by the CPC (Amendment Act, 2002) which amendment came into force with effect from 1.7.2002. Service of the defendant is dealt with under Sections 27 to 29 of the Code of Civil Procedure (for short: CPC). Section 28 deals with service of summons where the defendant resides in another State and reads as follows:

28. Service of summons where defendant resides in another State.- (1) A summons may be sent for service in another State to such Court and in such manner as may be prescribed by rules in force in that State.

(2) The Court to which such summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto.

(3) Where the language of the summons sent for service in another State is different from the language of the record referred to in Sub-section (2), a translation of the record:

(a) in Hindi, where the language of the Court issuing the summons is Hindi, or

(b) in Hindi or English where the language of such record is other than Hindi or English,

shall also be sent together with the record sent under that subsection.

To appreciate the important question which arises in this appeal, it would be first being appropriate to deal with the unamended provisions of the CPC. Prior to the promulgation of the Amendment Act, Order V, Rules 9, 19-A and 21 of the unamended CPC prior to 1.7.2002 read as follows:

9. Delivery or transmission of summons for service.- (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 to the proper officer to be served by him or one of his subordinates.

(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 by post or in such other manner as the Court may direct.

19-A. 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 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 not been received by the Court within thirty days from the date of the issue of the summons.

21. Service of summons where defendant resides within jurisdiction of another Court.-A summons may be sent by the Court by which it is issued, whether within or without the State, either by one of its officers or by post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides.

6. A bare perusal of the aforesaid provisions shows that unamended Rule 9 provided that when a defendant was residing within the jurisdiction of the Court, he could be served through the proper officer i.e. Processing Serving Agency of the Court. Sub-rule (2) of Rule 9 provided that if the proper officer is an officer of a Court other than that in which the suit is instituted, the summons could be sent to him i.e. the officer, by post or in such other manner as the Court may direct. The

necessity of enacting Rule 2 arose because in certain stations where there is more than one judicial officer, the Processing Serving Agency or the proper officer is under the control of one Court.

7. Rule 15 which was inserted by the Amendment Act 104 of 1976 provided that the service could also be effected on an adult member of the defendant's family. Rule 19-A was also inserted vide Amendment Act 104 of 1976 w.e.f. 1.2.1977 and empowered the Court to issue summons for service of the defendant by registered post acknowledgement due.

8. A bare reading of this Rule 19-A shows that the power was not limited to serving the parties residing within the jurisdiction of the Court and the Court was empowered to send summons through registered post acknowledgement due to any defendant whether residing within or without the jurisdiction of the Court.

9. Rule 20 which provides for substituted service can be resorted to only when the Court is satisfied that there is reason to believe that the defendant is avoiding service.

10. Rule 21 as unamended provided that in a case where the defendant was residing outside the jurisdiction of the Court, the Court in which the suit/proceedings were pending was required to send the summons through one of its officers or by post to the Court not being the High Court having jurisdiction over the place where the defendant resided.

11. From a bare perusal of the un-amended provisions of the CPC, it is apparent that the Court had the jurisdiction to serve a defendant by two modes i.e. by actually serving the summons through proper officer which in common parlance may be termed to be service through the Processing Service Agency and/or the Court could send summons under Order 19-A by registered post acknowledgement due. In case the defendant resided out side jurisdiction of the Court, the summons to be served through the Processing Serving Agency had to be sent either through the officer or by post to the Court having jurisdiction over the area where the defendant resides.

12. Keeping in view the advancement in technology and also keeping in view the fact that a large number of cases were being delayed due to cumbersome mode of effecting service of summons, the legislature in its wisdom amended the relevant provisions of law.

13. After its amendment, Order V, Rule 9 deals with service of defendants residing both within and without the jurisdiction of the Court. Rule 19-A was omitted and Rule 21 was also amended.

14. Order V, Rules 9, 9-A and 21 after amendment read as follows:

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 service 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 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

acknowledgement due), the provisions of Rule 21 shall not apply.

(5) When an acknowledgement 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 authorized 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, 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 acknowledgement 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).

9-A. Summons given to the plaintiff for service.-(1) The Court may, in addition to the service of summons under Rule 9, on the application of the plaintiff for the issue of a summons for the appearance of the defendant, permit such plaintiff to effect service of such summons on such defendant and shall, in such a case, deliver the summons to such plaintiff for service.

(2) The service of such summons shall be effected by or on behalf of such plaintiff by delivering or tendering to the defendant personally a copy thereof signed by the Judge or such officer of the Court as he may appoint in this behalf and sealed with the seal of the Court or by such mode of service as is referred to in Sub-rule (3) of Rule 9.

(3) The provisions of Rules 16 and 18 shall apply to a summons personally served under this rule as if the person effecting service were a serving officer.

(4) If such summons, when tendered, is refused or if the person served refuses to sign an acknowledgement of service or for any reason such summons cannot be served personally, the Court shall, on the application of the party, re-issue such summons to be served by the Court in the same manner as a summons to a defendant.

21. Service of summons where defendant resides within jurisdiction of another Court.-A summons may be sent by the Court by which it is issued, whether within or without the State, either by one of its officers [or by post or by such courier service as may be approved by the High Court, by fax message or by Electronic Mail service or by any other means as may be provided by the rules made by the High Court] to any Court (not being the High Court) having jurisdiction within whose jurisdiction it is to be served.

15. Sub-rule (1) to Sub-rule (3) of Rule 9 deal with service of summons on defendant residing within the jurisdiction of the Court. Sub-rule (1) provides that the Court unless it otherwise directs may deliver summons to the defendant either through the Process Serving Agency or through the courier service as approved by the Court. Sub-rule (3) provides that in addition to the normal service through Process Serving Agency or approved courier service, the Court may direct the service of summons by registered post acknowledgement due, speed post, courier service, fax or electronic mail (for short: e-mail).

16. Sub-rule (4) deals with service of defendants residing outside the territorial jurisdiction of the Court. This sub-rule is not very happily worded. It is, however, apparent that the intention of this sub-rule is that when the defendant resides outside the jurisdiction of the Court in which the suit is instituted, service can be effected on such defendant by any mode of service as prescribed in Sub-rule (3) except registered post acknowledgment due. This would mean that the service can be effected upon a defendant residing outside the jurisdiction of the Court under Sub-rule (4) by courier service, speed post, fax or e-mail.

17. Sub-rule (5) provides that when the postal article through which the summons are sent to the defendant or his authorized agent is received back with an endorsement of an employee of the postal department or a person authorized by

the courier service, to the effect that the defendant or his agent has refused to take delivery of the postal article containing the summons when tendered or transmitted to him, the Court can declare that the defendant had been duly served. Proviso to Sub-rule (5) further mandates where the summons were sent through properly stamped, prepaid registered post acknowledgement due and the acknowledgement is not received back within thirty days from the date of issue of the summons for any reason whatsoever, the Court can issue a declaration referred to in Sub-rule (5).

18. Rule 6, lays down that the High Court or the District Judge shall prepare a panel of courier agencies for the purpose of Sub-rule (1).

19. Rule 9-A provides a new method of service. This method is available to the Court only if the plaintiff applies for the same. In case the plaintiff makes an application to the Court, the Court may permit the plaintiff himself or through his agent to effect service upon the defendant(s) directly. This, however, has to be in addition to the mode of service of summons provided under Rule 9. Under Sub-rule (2), the service of summons shall be effected by the plaintiff himself or through some other person by delivering or tendering to the defendant personally a copy of the summons signed by the Judge or authorized officer of the Court. The provisions of Rules 17 and 18 CPC apply to such summons. It is important to note that under Sub-rule (4) if the defendant refuses to accept the summons or refuses to sign an acknowledgement of the receipt of the summons, the defendant cannot be proceeded against ex parte. It is obvious that the legislature was aware that some unscrupulous plaintiff may make a false statement that the defendant has refused to accept the summons or sign the acknowledgement. Therefore, under Rule 9-A, service is valid only if the defendant actually receives the summons and signs the acknowledgment.

20. The purpose of Rule 21 is to save the time of the Court and to take advantage of the advancement of technology and also to take advantage of the new alternative method of post i.e. courier service. This rule provides that when summons are sought to be served through the Process Serving Agency of some Court other than the Court in which the case is pending the Court where the matter

is pending can send the summons to the Court having jurisdiction over the area where the defendant is residing and through which Court service is to be effected, by post, courier service, fax message or e-mail, or any other means as may be provided by the rules made by the High Court.

21. Earlier under Order 21, the Court was bound to send summons to another Court either through its officer or by post. Now summons can be sent by one Court to another by any of the means mentioned therein. After receipt of the summons, the recipient Court is required to get the summons served upon the defendant in terms of Rule 23.

22. After analyzing all the legal provisions, I am summarizing the various modes of service available to the Court in case of defendant residing within or without the jurisdiction of the Court where the matter is pending.

Service of summons on defendant residing within the jurisdiction of the Court.

23. On a close and careful scrutiny of the legal provisions, it is apparent that in the case of defendants residing within the territorial jurisdiction of the Court where the suit is pending, the Court is required to normally issue summons only through the process-serving agency or through approved courier service. It may, however under Rule (3), also direct service of summons on the defendant(s) by registered post acknowledgement due, speed post, courier service as well as fax message or e-mail. In addition, the plaintiff can apply that he may be permitted to serve the defendant personally under Rule 9-A.

Service of summons where the defendant resides outside the jurisdiction of the Court.

24. In cases where the defendant resides outside the territorial jurisdiction of the Court in which the suit is instituted, the Court cannot issue summons by registered post acknowledgement due. It has been urged that this is a retrograde step and will unnecessary delay the suit. It does not appear to be so. Probably, the reason why registered post service has not been permitted when the defendant resides outside the jurisdiction is that in a large number of cases, the registered letter

never comes back and then a declaration of deemed service is made after thirty days. The legislature, probably felt that where the defendant resides far away, outside the jurisdiction of the Court, it would be unjust to raise such a presumption.

25. Be that as it may, this Court cannot go into the reasons which may have weighed with the legislature since the language of Sub-rule (4) is absolutely clear and the only interpretation which can be given to Sub-rule (4) is that when the defendant resides outside the jurisdiction, he can under this sub-rule only be served by speed post, courier service, fax message or e-mail but not by registered post acknowledgement due.

26. It is important to note that in Sub-rule (4), it has been mentioned that the provisions of Rule 21 shall not apply when service is sought to be effected by any of the methods provided in Sub-rule (3) except registered post acknowledgement due. This only means that the Court while sending summons through speed post, courier service, fax message or e-mail, is not required to send summons to the Court in whose jurisdiction the defendant resides. The summons can be sent directly to the defendant without the intervention of the other Court. This is supported by basic common sense. There is no reason why summons which have to be sent by speed post, courier service, fax or e-mail should be sent to another Court for onward service. This will save time and money. However, this does not mean that the defendant residing outside the jurisdiction of the Court cannot be served by the mode of process serving agency. This mode is still available under Order V, Rule 21 wherein the Court can send the summons to the Court (not being the High Court) having jurisdiction over the place where the defendant resides. Similarly, service can be effected on the application of the plaintiff on such defendant under Rule 9-A also.

27. As discussed above, the summons can be sent by various modes to shorten the time. The summons can be sent by fax, e-mail, courier service or by speed post. They can also be sent through an officer of the Court. Once the officer of the recipient Court receives the summons, the same can be served under Rule 23 upon the defendant. The impact of this sub-rule is that when the Court serves* summons received through fax or e-mail, they may not bear the actual seal and

signature of the Court. Obviously, summons sent by fax or e-mail cannot contain the original seal and signature of the Court and shall have only a facsimile image of the same. A presumption will have to be raised that service of these summons not bearing the original seal or signatures is valid service. The Code of Civil Procedure, recognizes that this is a proper means of service and the defendant cannot urge that the service upon him is not proper only on the ground that the summons received by him do not bear the actual seal and signature of the Court.

Facts of the Present Case.

28. Keeping in view the law as discussed above, it is apparent that even if it is accepted that the defendant had actually refused to accept the tendered summons sent to him through registered post acknowledgement due, this could not be deemed to be proper service since the learned trial Court had no jurisdiction to order service through registered post acknowledgement due in case of a defendant residing outside the jurisdiction of the Court.

29. The petition is, therefore, without any merit and the same is accordingly rejected.

30. Parties through their Counsel are directed to appear before the learned trial Court on 13th October, 2008. The Registry is directed to return all the records to the learned trial Court so as to reach well before the date fixed. The learned trial Judge is requested to make an earnest effort to decide the case as early as possible.

31. Keeping in view the important question involved in this case with regard to various legal modes of service available, the Registrar General of this Court is directed to send a copy of this judgment to all the subordinate Courts in Himachal Pradesh.