

The Board of Trustees for the Port Vs. Unknown

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Court : Kolkata

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Appellant : The Board of Trustees for the Port

Respondent : Unknown

Judgement :

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G. A. No. 3240 of 2005

G. A. No. 3239 of 2005

C.S. No. 222 of 1992

IN THE HIGH COURT AT CALCUTTA

ORDINARY ORIGINAL CIVIL JURISDICTION

ORIGINAL SIDE

IN THE MATTER OF:-

THE BOARD OF TRUSTEES FOR THE PORT OF CALCUTTA -V-

SITARAM JHUNJHUNWALA

Appearance:

Mr. Joydeep kar, Adv.,

Mr. Sandip Kumar De, Adv.

.....For the Plaintiff/Decree Holder.

Mr. Malay Kumar Ghosh, Adv.,

Mr. Amitabh Ghosh, Adv.,

Mr. P. K. Tulsyan, Adv.

.....For the Defendant/Judgment Debtor.

BEFORE:

THE HON'BLE MR. JUSTICE MAHARAJ SINHA.

DATE: 20-09-2011.

The Court: - This is an application, G.A. No. 3239 of 2005 for setting aside of an ex parte decree dated 28 June 1993 passed in the above suit, C.S. No. 222 of 1992, there is also an application of the 2

judgment-debtor for condonation of delay in making the application for setting aside the ex parte decree in question.

I would first deal with the application for condonation of delay and then the merits of the application of setting aside the ex parte decree in question one after the other in this judgment. The case made out by the defendant/judgment-debtor (defendant, in short) in the application for condonation of delay is that the defendant "did not receive any copy of the writ of summons and/or plaint and the defendant had no knowledge of the above suit of the plaintiff" till 21 July 2005. The defendant, however, came to know of the suit when he received the application for execution of the decree in question.

After the receipt of the execution application the defendant on 26 July 2005 contacted his lawyer and instructed him to present his case before the Court that

no copy of the writ of summons and/or plaint were served upon the defendant. The concerned advocate, however, called the defendant to his chamber on 27 July 2005 but as the defendant "fell ill and had a hepatic problem" he could not meet his advocate.

On 31 July 2005, the defendant was diagnosed with acute hepatitis and as such he was advised bed rest. The condition of the defendant, however, "had deteriorated and had almost reached a stage of hepatic semi-coma". This statement of the defendant, 3

however, is supported by the prescription of the defendant's doctor annexed to the petition.

However, because of his illness the petitioner could not file his application for setting aside the said ex parte decree. In the process, according to the petitioner, there had been about 39 days of delay in making the application for setting aside the decree in question and as such, the defendant, has good grounds for seeking condonation of delay in making the application for setting aside the ex parte decree.

In paragraph 8 of the application the defendant has mentioned several dates and tried to explain why there had been about 39 days of delay in making the application for setting aside the ex parte decree. I have read the application including the particulars very carefully.

The Board of Trustees for the Port of Calcutta (the plaintiff, in short) in opposing the application of the defendant for condonation of delay has primarily taken a stand in its affidavit that the defendant used always to keep his Office closed so that the bailiff of this Court could not serve the writ of summons upon him, the plaintiff as such was right in proceeding with the suit and the Court, in fact, was pleased to direct a "substituted service" inter alia by publication in the leading newspapers.

This apart, soon after the decree was passed by this Court, the plaintiff issued or caused to be issued various notices on several occasions to the defendant but the defendant "refused to act in terms of such notices nor he approached this Court for recalling of the decree in question" and the application for condonation of delay as such should be dismissed.

The plaintiff has also said that the defendant suppressed the fact that on or about 18 June 1997 he had received a notice directly from the concerned department of the plaintiff and in spite thereof the defendant had not taken any steps either for payment or for recalling the said decree even in June 1997. The plaintiff has also said that when the receiver appointed by this Court went to make inventory on 27 August 2005, the defendant "himself resisted her to enter the flat in question and never complained about his ill health".

According to the plaintiff, the delay in any event should not be condoned as the defendant duly received the above notice of demand dated 9 June 1997 as he acknowledged the receipt of such notice on 18 June 1997 but "no action was taken by the defendant" even thereafter for recalling of the decree in question.

The plaintiff, in fact, served the demand notice upon the defendant on 9 June 1997 by a registered mail and the same was duly received by and/or on behalf of the defendant and this is evident from the copy of the postal acknowledgement card annexed to the 5

Affidavit-in-Opposition (Annexure - B to Affidavit-in-Opposition, at page 20 thereof).

The defendant, however, in its reply has simply said that the initial appearing in the postal acknowledgement card is not the signature of the defendant and the defendant never, in fact, received the said notice of demand and that the copy of the acknowledgement card does not also contain any seal and stamp of the postal authority.

It appears from the letter of demand dated 9 June 1997 that the plaintiff clearly stated that the decree was passed on 28 June 1993 by the High Court (Babulal

Jain, J.) against the defendant for Rs.5,29,000/- with interim interest and interest on judgment at 12 per cent per annum until payment and the plaintiff was demanding payment of the decretal amount with interest within two weeks from the date of receipt of the demand and that in the absence of payment the plaintiff would take appropriate legal steps against the defendant. In the Affidavit-in-Reply, however, the defendant has said that the notice of demand did not, in fact, contain any particulars of the suit number, year of the suit and the Court where the suit had been instituted.

Mr. Moloy Ghosh, learned Counsel appearing on behalf of the defendant has primarily relied on Article 123 or rather its explanation of the Limitation Act 1963. For the sake of convenience the said Article including its explanation is set out below:- 6

Description of Period of limitation Time from which application period begins to run

123. To set aside a The date of the Thirty days

decree passed ex decree or where the parte or to re-hear summons or notice an appeal decreed was not duly or heard ex parte. served, when the applicant had

knowledge of the

decree.

Explanation.- For

the purpose of this

article, substituted

service under rule

20 of Order V of the

Code of Civil

Procedure, 1908 (5

of 1908) shall not
be deemed to be
due service.

According to Mr. Ghosh, since admittedly the writ of summons of the suit of the plaintiff was served upon the defendant by way of substituted service under Rule 20 of Order 5 of the Code of Civil Procedure (Code, in short), such service should not be deemed to be due service of writ of summons upon the defendant as far as the above article of the Limitation Act is concerned and since the defendant had no knowledge of the ex parte decree in question as stated in the application for condonation of delay, the delay of 39 days in making this application should be condoned. 7

On the above basis, it is very difficult not to accept the submission of Mr. Ghosh as correct because the submission of Mr. Ghosh is simply based on the grammatical construction of Article 123 or rather its explanation.

Since in the application the defendant has explained as to why the defendant could not make the application in time after the defendant came to know of the ex parte decree, i.e. on 21 July 2005 when he received the execution application, why should not then the delay in making the application for setting aside the ex parte decree be condoned to enable the defendant to demonstrate the merits of his application for setting aside the ex parte decree dated 28 June 1993.

The plaintiff, however, has taken the stand in its affidavit that the defendant, in any event, had the full knowledge that the decree was passed by this Court on 20 June 1993 from the said demand notice dated 9 June 1997 which the defendant duly received as evident from Annexure-B to the Affidavit-in-Opposition which I have already mentioned.

Mr. Joydeep Kar, learned Counsel appearing for the plaintiff in his turn has argued that since the defendant was avoiding the service of writ of summons upon him the Court upon being satisfied had ordered substituted service under the provisions of Order 5 Rule 20 and in due compliance with the said order the service of writ of 8

summons was effected upon the defendant strictly in the manner provided in the order. Thus the defendant's application for condonation of delay should not, in any event, be entertained.

Relying on the judgment of the Supreme Court in *Sunil Podder and; Ors. -V- United Bank of India*, (2008) 2 SCC 326 Mr. Kar has submitted further that the Supreme Court was pleased to point out that on the basis of the amended code the question is not whether the defendant was actually served with the writ of summons in accordance with the procedure laid down in the manner prescribed in Order 5 of the Code but whether the defendant had notice of the date of hearing of the suit and secondly whether he had sufficient time to appear and answer the claim of the plaintiff. Once these two conditions are satisfied, an ex parte decree cannot be set aside even if it is established that there was an irregularity in service of writ of summons.

The writ of summons in the present case was duly advertised in two leading newspapers, i.e. English and Hindi and the effect of such service under Sub-rule 2 of Rule 20 of Order 5 of the Code is that as if the writ of summons had been served upon the defendant personally. In spite thereof since the defendant did not choose to appear and that the defendant did deliberately to obtain an undue advantage over the plaintiff, the defendant is not entitled to any concession and therefore the delay in moving the application, which according to Mr. Kar, was much much more than 39 days as 9

according to the plaintiff the defendant had the knowledge of the decree way back in the year 1997, to be precise on 18 June 1997 when the defendant received the said demand notice from the plaintiff, should not be condoned simply by virtue of the explanation of Article 123 of the Limitation Act to allow the plaintiff to present a wholly unmeritorious case for setting aside the decree in question.

Mr. Kar may well be right in his submission that the plaintiff should not be allowed to present a wholly unmeritorious case for setting aside the decree in question. But, since on a plain reading of the explanation of Article 123 of the Limitation Act it is clear that when a service of writ of summons is effected upon the defendant under the provisions of Rule 20 of Order 5 of the Code the service of writ of

summons should not be deemed to be due service for the purpose of that article and when the defendant has given some explanation as to why he was not in a position to make the application within the period of limitation after he received the copy of the execution application, I am prepared to give the defendant the benefit of doubt for condoning the delay in making the application accepting the delay was only of 39 days to enable the petitioner to present his case for setting aside the ex parte decree on merits. I use the expression "benefit of doubt" because I cannot say with any degree of certainty having regard to the facts and circumstances of the case before me that the defendant had no knowledge of the ex parte decree before 21 July 2005 as asserted by him. 10

True it is, "the onus is on the defendant to show that the application is within time and that he had knowledge of the decree within 30 days of the application. If the defendant produces some evidence to show that the application is within time, it is for the plaintiff to rebut this evidence and to establish satisfactorily that the defendant had knowledge of the decree more than 30 days before the date of the application". [See Panna Lal -V- Murari Lal, AIR 1967 SC1384 para 3 at page 1385].

The expression "Knowledge of the decree" in Article 123 of the Limitation Act is of immense importance as the case of the defendant is that the summons was not duly served on him and that he had no knowledge of the decree before a particular date. Whether in a given case a defendant had the knowledge of the decree passed against him is a question of fact. As the Supreme Court said - "It is a question of fact in each case whether the information conveyed to the defendant is sufficient to impute to him knowledge of the decree within the meaning of Article 164. The test of the sufficiency is not what the information would mean to a stranger, but what it meant to the defendant in the light of his previous dealings with the plaintiff and the facts and circumstances known to him. If from the information conveyed to him the defendant has knowledge of the decree sought to be set aside, time begins to run against him under Article 164. It is not necessary that a copy of the decree should be served on the defendant. It is sufficient that the defendant has knowledge of the material facts concerning the decree, so that he has a clear perception of the injury suffered by him 11

and can take effective steps to set aside the decree". [See Panna Lal (supra), para 4 at page 1386 of the report].

Furthermore, under the provisions of Rule 20 of Order 5 it is clear that the effect of service of writ of summons under this Rule is that the defendant is served with the summons personally. At the same time I also do not hesitate to say as I should not that Sub-rule 2 of Rule 20 of Order 5 is in direct conflict with the explanation provided in Article 123 of the Limitation Act, or rather, the said Rule and in particular Sub-rule 2 thereof runs contrary to the explanation provided in Article 123 of the Limitation Act.

However, since I have decided to give the defendant the benefit of doubt so as to give him an opportunity to place his case for setting aside the decree on merits, the delay in making the application for setting aside the ex parte decree is condoned.

APPLICATION FOR SETTING ASIDE

As far as the defendant's application for setting aside the ex parte decree is concerned it is very short indeed, if not extremely sketchy. The defendant, it is stated, came to know for the first time on 21 July 2005 that a decree was passed against him on 28 June 1993 by this Court, namely by Justice Babulal Jain (as his Lordship then was).

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The defendant was not duly served with any notice of filing of the suit or writ of summons or the plaint. The defendant also did not know that the suit would be heard ex parte on 28 June 1993. It is repeated that the defendant only came to know on 21 July 2005 that a decree was passed when he received the execution application. The defendant, therefore, did not get any opportunity to file the written statement and contest the suit. The decree as such should be set aside and the defendant should be allowed to file his written statement for contesting the suit. It is stated further that although the defendant has a good defence to the suit, he is unable to deal with the merits of the suit in the absence of a copy of the plaint

(wrongly printed as "plaintiff" in the petition).

From the affidavit used in opposition by the plaintiff to the defendant's application it appears that a suit, Suit No.222 of 1992 was instituted by the plaintiff on 17 March 1992 claiming a decree for Rs.5,29,000/-, interest, interim interest, receiver, injunction, attachment before judgment and costs.

The said suit, however, was decreed on 28 June 1993 "for a sum of Rs.5,29,000/- only, with interest on judgment at the rate of 12 per cent per annum from the date of institution of the suit, i.e. 17 March 1992 with costs". The reasons as to why the plaintiff had to institute the suit against the defendant are stated in several subparagraphs of paragraph 3 of the Affidavit-in-Opposition and as such I do not intend to repeat the reasons as stated by the plaintiff once again. 13

After the decree, however, the plaintiff as aforesaid made a demand for payment of the decretal amount by a notice dated 9 June 1997 sent by registered mail to the defendant which was duly received by the defendant as evident from the acknowledgement dated 18 June 1997. In spite thereof the defendant being the judgment-debtor failed and neglected to pay the decretal dues to the plaintiff.

Then the plaintiff has also given an account in its affidavit as to how the plaintiff tried to recover the decretal amount and eventually approached the Court for execution of the decree and the orders passed by this Court on the execution application.

As far as the service of writ of summons of the suit upon the defendant is concerned, it appears that the Process Server of this Court was unable to serve the writ of summons upon him as the defendant used to keep his Office closed, as a result, the Court had to substitute the service of writ of summons and this service, needless to mention, was effected under Order 5 Rule 20 of the Code by the order dated 18 March 1993. The summons was published in two leading daily newspapers, one in English, namely Statesman and the other in Hindi, namely Viswamitra.

Apart from the above publication the writ of summons was also served by affixing a copy of the summons to the wall of the business 14

premises of the defendant and the wall of a specified place in the High Court as required under the provisions of sub-rule (1) of Rule 20 of Order 5 of the Code.

As I have said above that the only ground on which the application for setting aside the decree is based is that the defendant was not duly served with the writ of summons and the plaint and that the plaintiff also "was not aware of posting of the case ex parte on 28 June 1993 by the Suit Court". However, the due publication of the summons in the newspapers in terms of the order of this Court dated 18 March 1993 has never been and is not in dispute at all.

Relying on Sub-rule 3 of Rule 20 of Order 5 of the Code Mr. Ghosh, however, tried to suggest that since the Court did not fix any time for appearance of the defendant as provided in the Sub-rule the defendant was unable to appear for the purpose of defending the suit.

At this stage, for the sake of convenience Order 5 Rule 20 is set out below:-

"20. Substituted Service. - (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous 15

part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

[(1A) Where the Court acting under sub-rule (1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.]

(2) Effect of substituted service. - Service substituted by order of the Court shall be as effectual as if it has been made on the defendant personally.

(3) Where service substituted, time for appearance to be fixed. - Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require."

The above was the first limb of Mr. Ghosh's submission on the substituted service of writ of summons upon the defendant. I would first deal with this submission before I deal with the second limb of Mr. Ghosh's argument in support of his prayer for setting aside the decree in question.

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On a plain reading of the publication of the summons in the English newspaper, (the Statesman), I find nothing wrong in the publication at all. The publication was made in accordance with the provisions of Order 20 Rule 5 and the relevant "rules" and "forms" of the Code and Original Side Rules as well.

Since the publication made in the said English and Hindi newspapers form part of Annexure-C to the Supplementary Affidavit of Smt. Nupur Sarkar affirmed on 4 May of 2006 appearing at pages 9 and 10 thereof, it is not necessary to set out the entire publication as made in the English daily. However, the defendant was clearly told that "the defendant was required to cause an appearance to be entered for the defendant in the Office of the Registrar of this Court within 10 days and to file the defendant's written statement within 21 days from the date of the publication, exclusive of the day of such publication" and the defendant was summoned to appear before this Court in person or by an advocate of the Court to answer the plaintiff's claim on the day "the case is set down for hearing, upon which date the defendant must be prepared to produce all his witnesses and all documents in his possession or power upon which he intended to rely in support of his case and take notice that in default thereof the suit would be liable to be heard and determined in the absence of the defendant".

Even after a long hearing of the defendant's setting aside application I was not and have not been able to appreciate as to what 17

really prevented the defendant from appearing as the defendant was asked to do in the summons as published for effectively defending himself. There was and is no doubt, however, that the publication was made as ordered by this Court and in accordance with the provisions of Rule 20 of Order 5 of the Code and upon strict compliance with the relevant form of such publication for substituted service.

Mr. Kar submitted that under Rule 15 of Chapter VIII of the Original Side Rules the defendant ought to have entered appearance on or before the day fixed for his appearance in the writ. He ought to have provided his name and place of business of his lawyer, namely his Advocate-on-Record, if the defendant had engaged someone for the purpose, namely an advocate acting on the Original Side. If the defendant had wanted to defend himself in person he should have provided his name and place of residence as required under the said rule. Since in this case the defendant admittedly did not appear or there was default on his part to enter appearance as required, the suit under Rule 16 of Chapter VIII of the Original Side Rules was liable to be heard *ex parte*.

On a plain reading of both the Rules 15 and 16 of Chapter VIII makes this position very clear. Since the defendant did not enter appearance as he was obliged to do for the purpose of defending the suit, it is not necessary for me to state as to what steps the defendant 18

was required to take after he entered appearance in terms of Rule 15 of Chapter VIII of the Original Side Rules.

Mr. Ghosh, I have no doubt, is fully aware of this procedure as to what a defendant should do if he wants to defend the suit instituted in the Original Side of this Court but he still wanted to set up a defence in order to justify the defendant's non-appearance after the publication of the summons in the newspapers because, I am sure, he did not have any better ground or grounds to justify the failure on the part of the defendant to do what the defendant ought to have done after the publication of the summons in the newspapers or rather after the due service of

the writ of summons upon him.

The decision relied on by Mr. Ghosh in *Debendra Nath Dutt -V- Smt. Satyabala Dasi*, AIR (37) 1950 Calcutta 217 of his Lordship Justice P. B. Mukharji makes the consequence of non-appearance of the defendant or his failure to enter appearance absolutely clear. His Lordship said "there are two consequences of not entering appearance under the Rules, one is that the suit is liable to be heard *ex parte* and the other is that no written statement can be filed". [See Paragraph 15 at Page 219 of the report].

What a defendant can do or cannot do if he fails to enter appearance as required of him, once he is served with the writ of summons in a given case is not what I am called upon to decide on this application.

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Since in this case the plaintiff effected the substituted service in terms of the order of this Court and in accordance with the procedure of such publication it was the obligation of the defendant and the defendant alone to take effective steps for defending the suit if he so wanted. The plaintiff could not and cannot in any way be made responsible for the fault or default on the part of the defendant for not entering appearance for the purpose of defending the suit.

It is even impossible to suggest that the plaintiff was under any special or additional obligation to do anything more than what the plaintiff, in fact, had done for effecting the service of the writ of summons under the provisions of Order 20 Rule 5 of the Code. Under Sub-rule 2 of Rule 20 of Order 5 of the Code when a service is substituted by an order of the Court, as was done in this case, such service becomes as effectual as if the service of writ of summons "has been made on the defendant personally".

In a situation like this, can it even be conceived that the defendant was unable to appear and contest the suit as he had no notice of the date of hearing and consequently did not have sufficient time to appear and answer the plaintiff's claim as suggested by Mr. Ghosh?

In my judgment, it is impossible to conceive that since in the publication the date of hearing was not mentioned the defendant was 20

unable to appear and defend the suit in spite of the valid service of the writ of summons upon him by way of substitution. I shall deal with this a little more when I deal with the second limb of Mr. Ghosh's argument.

Suffice it to say that the defendant in this case in spite of a valid service of the writ of summons upon him in terms of the order of this Court failed to appear or enter appearance as he was asked to do for the purpose of defending the suit. The failure on the part of the defendant, I have no doubt in my mind, was deliberate as the defendant has been unable to give any reason far from any acceptable reason or justification for his chosen failure. The first limb of Mr. Ghosh's argument is thus wholly unacceptable.

Secondly, relying on the provisions under Order 9 Rule 13 of the Code, it was said that since the defendant did not have any knowledge of the date of hearing as provided in the second proviso to Rule 13 of Order 9 of the Code he was unable to appear and answer the plaintiff's claim. I think this argument of Mr. Ghosh was made in utter desperation as Mr. Ghosh perhaps found no better ground or rather excuse for the defendant's failure to appear or rather "enter his appearance" to the writ of summons after its due publication in the newspapers.

In my opinion, however, when the Court is considering a case for setting aside an ex parte decree under Rule 13 of Order 9 where 21

the service of writ of summons has been substituted by the order of the Court under Rule 20 of Order 5 then the provisions of both the Rules are to be read combinedly for a proper appreciation of the meaning and effects of the provisions of such Rules on such case.

The provisions of both the Rules, namely Order 20 of Rule 5 and Order 13 of Rule 9 of the Code are so clear that a grammatical construction of the said provisions are enough for ascertaining the effects of the Rules on a given case and in the present case, on the basis of the above construction of both the provisions of the

said Rules, I think the expression 'date of hearing' in the second proviso to Rule 13 of Order 9 means the date mentioned in the writ of summons because once the writ of summons is duly served upon the defendant it is for the defendant to take steps in accordance with the procedures to defend the suit which in the present case the defendant either deliberately failed to do or did not choose to do in spite of clear knowledge of the date of his appearance or for entering appearance.

In a situation like this, the plaintiff cannot be expected to mention the date of hearing of the suit instituted by the plaintiff as the date of hearing of the suit cannot, in fact, be known to the plaintiff when the writ of summons is served upon the defendant. I know no writ of summons issued so far by this Court which mentioned the date of hearing of the suit beforehand. The writ of summons published in the Newspapers, however, asked the 22

defendant to cause his appearance and do things necessary as mentioned in the summons for effectively defending the suit.

Since in the present case there was no failure or neglect on the part of the plaintiff in serving the writ of summons or rather in substituting the service as ordered by the Court and since the defendant as such had more than sufficient notice and knowledge as to what he was required to do after the writ of summons was published in the newspapers the defendant should not be allowed to take or rather cannot take this hyper-technical approach as argued by Mr. Ghosh that since no date of hearing of the suit was mentioned in the summons as published in the Newspapers the setting aside application must succeed.

Speaking generally, after a suit is instituted by a plaintiff in a given case it takes time to make the suit ready for hearing and the parties to the suit have to comply with certain essential formalities and discharge some obligations for making the suit ready for hearing as provided in the Original Side Rules and the relevant provisions of the Code.

Thus the plea of the defendant that the defendant could not appear and defend the suit in spite of the publication of the summons in the newspapers as the defendant was not aware of the date of hearing of the suit should be and is rejected outright

in the facts of this case.

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The defendant, on the contrary, I find, failed to appear in Court or enter his appearance in spite of proper service of writ of summons upon him and take steps as he was required to do for effectively defending the suit and the plaintiff in such a situation cannot suffer or cannot be made to suffer for the fault or default of the defendant as the defendant was wholly to be blamed for non-appearance and the plaintiff was not blameworthy at all.

Since, in the instant case, the suit was decreed ex parte for the defendant's non-appearance the decree cannot also be set aside because of the failure of the defendant to defend the suit as the failure of the defendant to take the necessary steps for defending the suit was the cause for suit being heard ex parte and decreed as such.

On a combined reading of Order 5 Rule 20 and Order 9 Rule 13 it cannot be said that the writ of summons was not duly served or that the defendant had no notice of the date of his appearance and as such did not have "sufficient time to appear and answer the plaintiff's claim". In fact, from the publication it appears that the defendant had the full notice of the date of his appearance and more than enough time to appear and answer the plaintiff's claim which he did not choose to do as he failed to enter appearance and consequently failed to file the written statement to contest the suit. 24

Since the writ of summons was duly published in the Newspapers as ordered, it was the obligation of the defendant to enter appearance as the effect of the substituted service was and is as good as personal service. The plaintiff had no further obligation to inform or intimate the defendant the date of hearing of the suit ex parte as the suit remained an undefended suit due to the failure of the defendant to enter appearance after being duly served with the writ of summons. In a situation like this the decree passed by this Court ex parte because of the failure of the defendant to defend the suit is not liable to be set aside and is to be treated to be a perfectly valid decree for all purposes.

The judgment of the Supreme Court in *Sushil Kumar Sabharwal -V- Gurpreet Singh and; Ors.*, AIR 2002 SC 2370 though relied on in support of the defendant's excuse for non-appearance does not help the defendant or his case at all.

Relying on the above judgment Mr. Ghosh wanted to say that since the defendant had no notice of the date of hearing he was unable to appear to defend the suit. Indeed, the Supreme Court in that judgment said "it is the knowledge of the date of hearing and not the knowledge of pendency of the suit which is relevant for the purpose of proviso", meaning thereby the second proviso to Rule 13 of Order 9 of the Code.

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But in what context the Supreme Court made this observation has to be appreciated only from the facts of that case. The Supreme Court was fully satisfied that the writ of summons in that case was not at all served upon the defendant or rather, the so-called service of writ of summons upon the defendant was not regarded as due service at all.

In this respect, the Supreme Court, in fact, accepted the evidence of the appellant who was the defendant in the suit rather than the evidence of the Process Server. The appellant in that case appeared in the witness box and deposed on oath that no summons was tendered to him by any Process Server of the Court.

According to the Supreme Court, the oath of the appellant was more weighty than the oath of the Process Server and since the Supreme Court believed that the appellant or rather the defendant was not duly served with the writ of summons he could not possibly expect to know the date of hearing and, therefore, did not have sufficient time to appear and answer the plaintiff's claim.

In the absence of cross-examination on behalf of the landlord/respondent the Supreme Court also could not draw an inference that the appellant had in any manner a notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim which he did not avail and utilize. The judgment of the Supreme Court was based on the finding that the summons was not 26

served on the defendant/appellant and if I may borrow the language of the Supreme Court as used by it in the judgment, "be that as it may, we are satisfied that the summons was not served on the defendant/appellant, he did not have opportunity of appearing in the Trial Court and contesting the suit on merits." [See Paragraphs 9, 11 and; 13 at Page 2372 of the report].

The Supreme Court, however, in that case was not concerned with the service of writ of summons under Rule 20 Order 5 of the Code at all. The Supreme Court was only concerned with whether the ex parte decree passed in the suit in question was liable to be set aside under Order 9 Rule 13 of the Code on the ground of non-service of writ of summons upon the defendant, namely the appellant before the Supreme Court.

In the present case, since the service of writ of summons was substituted by the order of this Court under Rule 20 Order 5 of the Code properly, I treat the service of Writ of Summons upon the defendant as effective as if the defendant was served with the writ of summons personally.

I have already said that in spite of due service of the writ of summons upon the defendant the defendant in this case did not choose to appear or enter appearance for the purpose of effectively defending the suit.

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In *Sushil Kumar (supra)*, the Supreme Court, however, considered the effect of Order 9 Rule 6 of the Code and said that when the Court was satisfied that the summons was duly served "the Court may make an order that the suit be heard ex parte". It is indeed the discretion of the Court whether to pass the decree ex parte in a case before it, but when the Court is satisfied as to the due service of writ of summons then the Court has the duty to recognize such right of the plaintiff to seek the decree ex parte as the suit in spite of due service of writ of summons upon the defendant remains undefended or uncontested. The plaintiff's right to seek the decree ex parte is, however, subject to one condition that the plaintiff must prove his own case to obtain the decree.

Since in the present case the service of writ of summons was effected upon the defendant under the provisions of Order 20 Rule 5 strictly in accordance with the manner provided in the Code and the High Court Rules the Court was pleased to decree the suit ex parte.

When the Supreme Court in *Sushil Kumar* (supra) said that the defendant must know the date of hearing, it meant "the date appointed for hearing the suit for which the defendant is summoned to appear is a significant date requiring a conscious application of mind on the part of the Court to satisfy itself on the service of summons". [See Paragraph 12 at Page 2372 of the report]. 28

Since, in the present case, as I have said above, the Court was fully satisfied as to the due service of the writ of summons upon the defendant and the defendant's failure to appear and defend the suit in spite of due service of writ of summons upon him, the Court was pleased to pass the decree ex parte as the Court thought quite rightly that the plaintiff was entitled to obtain the decree ex parte as of right because of the failure of the defendant to defend the suit as provided in the Code as well as the High Court Rules.

I also had the occasion to deal with the above decision of the Supreme Court in *Pritam Sen -V- Smt. Swastika Sen* (Mukherjee), (2009) 2 C.L.T. 142 (HC) in considering a case whether the defendant who was seeking to defend the suit instituted against her by the plaintiff should be allowed to do so on the alleged ground of lack of due service of writ of summons upon her. [See paragraphs 36, 37, 38 at pages 153 and 154 of the report].

I, however, adopt the reasons given by me in *Pritam Sen* (supra) for not applying the decision of the Supreme Court in *Sushil Kumar* (supra) to the case before me as it has no application to the facts of the present case at all.

On the contrary, relying on the decision in *Sushil Kumar* (supra), I hold that the ex parte decree in the present case was rightly passed as the Court was fully satisfied that the writ of summons was duly served upon the defendant and in spite thereof the defendant 29

did not choose to appear and defend the suit and the plaintiff as such was entitled to obtain the decree ex parte.

I also reject the claim of the defendant that the service of writ of summons as published in the newspapers should not be held to be due service as the name of the defendant's business was not properly mentioned in the cause title.

Under the second proviso to Rule 13 of Order 9 of the Code it is provided that "no Court shall set aside the decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim".

On the basis of this proviso the wrong name of the business of the defendant should merely be treated an irregularity, if at all. Admittedly, the business of the defendant was a sole proprietorship business and the defendant, as I have already held, knew full well the date of hearing or rather the date of his appearance for defending the suit and also had sufficient time to appear and answer the plaintiff's claim which the defendant did not choose to do.

Mr. Joydeep Kar, learned Counsel in his turn, however, relied on two judgments of the Supreme Court, namely (1) *Basant Singh and; Anr. -V- Roman Catholic Mission*, AIR 2002 SC 3557 and (2) *Sunil Poddar* 30

and; Ors. -V- *Union Bank of India*, (2008) 2 SCC 326 in support of his submission that even though the name of the business was not properly printed in the newspaper publication of the summons that could at best be regarded as a mere irregularity as clearly provided in the second proviso to Order 9 Rule 13 and such irregularity could not, in any event, be a ground for setting aside the decree in question.

I agree with Mr. Kar that both the judgments of the Supreme Court fully apply to the case before me but since I have already held that the writ of summons in the present case was duly served upon the defendant and in spite thereof the defendant did not choose to appear for the purpose of defending the suit, it is not

necessary for me to deal with the above two judgments of the Supreme Court in any detail.

In the present case, the defendant has not even made any attempt apart from saying that he was not duly served with the writ of summons or any notice of the suit instituted by the plaintiff to substantiate his stand or prove his case before me apart from making a feeble and faint attempt that since no date of hearing of the suit was known to the defendant or mentioned in the summons published in the newspapers, he could not appear to defend the suit.

The mere mentioning of a wrong name of the proprietorship business of the defendant in the cause title of the summons as 31

published in the newspapers, in my view, cannot be termed even a mere irregularity in service of summons as the name of the defendant, his address and other particulars were fully in order and published accurately in the newspapers.

Above all I am convinced that the defendant had otherwise full "knowledge of the proceedings and he could have appeared and answered the plaintiff's claim", if he wanted to. The defendant, therefore, should not be allowed to make out a case of non-service of writ of summons for setting aside the ex parte decree passed against him as the defendant has done since the defendant in spite of due service of writ of summons upon him had either chosen not to appear, or deliberately failed to appear, or enter his appearance for the purpose of defending the suit instituted by the plaintiff.

Thus the application of the defendant for setting aside the decree in question should be and is dismissed and the interim order, if any, is vacated.

However, having regard to the facts and circumstances of the case and particularly the conduct of the plaintiff that it took the plaintiff nearly 12 years to decide to execute the decree in question and the tenacity with which Mr. Ghosh has tried to make out a case on behalf of the defendant against all odds, I do not impose any cost upon the defendant.

Urgent certified photocopy of the judgment, if applied for, should be issued expeditiously.

[MAHARAJ SINHA, J.]

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