

OD- 3 & 4

IN THE HIGH COURT AT CALCUTTA

(Ordinary Original Civil Jurisdiction)

ORIGINAL SIDE

IA No. GA/5/2023

IA No. GA/6/2023

In CS/193/2019

ERA BANTHIA.

Vs.

M/S. SHIVSONS & ORS.

BEFORE :

The Hon'ble JUSTICE KRISHNA RAO

Hearing Concluded On : 28.07.2023

Order On : 07.08.2023

Appearance

Mr. Sabyasachi Choudhury, Adv.

Mr. Debdtut Mukherjee, Adv.

Ms. A. Rao, Adv.

Ms. A. Basu, Adv.

Mr. Sanwal Tibrewal, Adv.

...for the plaintiff

Mr. Ishan Saha, Adv.

Mr. Nilay Sengupta, Adv.

Mr. Sujit Banerjee, Adv.

...for the defendant nos. 1 to 3.

Mr. Pratip Mukherjee, Adv.

Mr. Sudip Basu, Adv.

...for the defendant no.4.

ORDER

1. The plaintiff has filed an application being GA No. 5 of 2023 seeking condonation of delay for issuance of writ of summons and for a direction upon the department for issuance of writ of summons upon the defendants.
2. The defendant nos. 1, 2 and 3 have filed an application being GA No. 6 of 2023 seeking rejection of plaint as the plaintiff has not lodged writ of summons with the Sheriff's department of the suit for service upon the defendants.
3. The plaintiff has filed the suit against the defendants for Specific Performance of Contract and allied prayers. After filing of the suit, the plaintiff has also filed an application being GA No. 2521 of 2019 for grant of temporary injunction.
4. The defendant no. 4 had entered appearance and contested the application filed by the plaintiff by filing affidavit. The defendant nos. 1 to 3 have also filed an application being GA No. 367 of 2020 praying for recalling of the order dated 26th November, 2019 passed in GA No. 2521 of 2019.
5. As the interlocutory applications were pending before the Hon'ble Court and the same was being contested and heard on a regular basis, the Advocate-on-record of the plaintiff, being pre-occupied with such hearings

have lost sight that writ summons have not been served upon the defendants.

6. Mr. Sabyasachi Choudhury, Learned Advocate appearing on behalf of the plaintiff submits that there is bonafide mistake on the part of the plaintiff by not lodging the writ of summons and as such the plaintiff may be given an opportunity to lodge the writ of summons so that the same can be issued upon the defendants.
7. Mr. Choudhury submitted that there is no willful and deliberate delay on the part of the plaintiff for issuance of writ of summons upon the defendants.
8. Mr. Choudhury submitted that all the defendants are appearing in the interlocutory application and the defendant nos. 1 and 3, who have filed an application being GA 367 of 2020 have also enclosed a copy of plaint and the documents in the said application which also indicates that the defendants are in possession of the copy of the plaint and the documents relied by the plaintiff.
9. Mr. Choudhury relied upon Chapter VIII, Rules 6, 7 and 8 of the Original Side Rules of this Court and submits that writ of summons can be issued even after the time prescribed under the law with the leave of the Court and as such the plaintiff has filed the present application praying for leave

for issuance of writ of summons and the same could not be filed within the time prescribed under law.

10. Mr. Choudhury relied upon the judgment reported in **2014 SCC OnLine Cal 9623 (NPR Finance Limited -vs- Deepak Jhunjhunwala)** and submitted that the object of the service of writ of summons on the defendant is to make him aware that a suit has been filed against him. If the defendant is otherwise aware of the institution of the suit eg. by reason of participation in the interlocutory proceeding or any parallel proceeding, the gravity of non-service or unduly delayed service of writ of summons would obviously be mitigated.
11. Mr. Choudhury further relied upon an unreported judgment passed in **GA 994 of 2016 in CS No. 62 of 2010 (Bansal Tea Company -vs- Hershey India Private Limited & Anr.)** and submitted that the Court cannot lose sight of the fact that the defendants have been contesting several interlocutory applications taken out by the plaintiff.
12. *Per contra*, Learned Counsel for the defendant nos. 1, 2 and 3 submitted that the defendant nos. 1, 2 and 3 were not the party to the interlocutory application being GA No. 2521 of 2019 and as such the plaintiff cannot take the benefit with regard to pendency of the interlocutory application.
13. Learned Counsel for the defendant nos. 1, 2 and 3 has relied upon under Order IX, Rule 5 of the Code of Civil Procedure, 1908 and submitted that

the plaintiff has not taken any step for extension of time for issuance of writ of summons within the prescribed period of time and has filed the present application only in the year 2023.

- 14.** Learned Counsel for the defendant nos. 1, 2 and 3 submitted that the application filed by the plaintiff is barred by limitation and the same is liable to be dismissed. He submits that the plaintiff has proceeded with the interlocutory application and obtained an order of injunction but has not taken proper steps for issuance of writ of summons.
- 15.** Learned Counsel for the defendant no. 4 submitted that the plaintiff after filing of the suit has not taken any steps for issuance of writ of summons but the plaintiff cannot take any benefit that the defendant had entered appearance in the interlocutory proceedings.
- 16.** Learned Counsel for the defendant no. 4 submitted that no reason has been shown by the plaintiff as to why the plaintiff has not taken any steps for issuance of writ of summons within the prescribed period as provided under law.
- 17.** Considered the rival submissions of the respective parties, perused the materials on record and the judgment relied by the parties. Admittedly, the plaintiff has not lodged writ of summons within the prescribed time though the plaint was admitted on 26th September, 2019. It is also admitted fact the plaintiff has filed interlocutory application being GA

2521 of 2019 praying for injunction and the defendant no. 4 had contested the said application by filing affidavit. It is also admitted that the defendant nos. 1, 2 and 3 have filed an interlocutory application being GA 3 of 2020 (Old GA No. 367 of 2020) praying for modification/vacation of interim order passed in GA No. 2521 of 2019.

18. The defendant nos. 1, 2 and 3 while filing the application being GA No. 3 of 2020 had annexed the copy of plaint and connected documents with the said application thereby it reveals that the defendant nos. 1, 2 and 3 were in possession of the plaint and the document of the suit.
19. The plaintiff has made a categorically statement that the interlocutory applications were pending before this Court and the same being was contested and heard on a regular basis due to which the advocate-on-record of the plaintiff being pre-occupied with such hearings lost sight of the fact that the summons in the suit have not been served upon the defendants.
20. The judgment relied by the plaintiff in the case of **NPR Finance Limited**, the Hon'ble Division Bench of this Court held that :

“Upon a careful consideration of the decisions noted above, the law that emerges, as appears to us, is when the plaintiff defaults or unduly delays service of writ of summons on the defendant, and the defendant applies for dismissal of the suit on that ground, the Court has discretion as to whether or not to dismiss the suit. Such discretion has to be exercised on sound judicial principles. No straitjacket formula can be laid down for exercise of

such discretion. It will depend on the facts of each case. The period of delay, and the conduct of the plaintiff would obviously be two very important factors to be considered for exercise of such discretion.

The object of service of writ of summons on the defendant is to make him aware that a suit has been filed against him. If the defendant is otherwise aware of the institution of the suit eg. by reason of participation in interlocutory proceeding or any parallel proceeding, the gravity of non-service or unduly delayed service of writ of summons would obviously be mitigated. In some cases it may happen that due to prolonged talks of settlement between the parties, the plaintiff has refrained from taking steps for service of writ of summons on the defendant. In such cases also the conduct of the plaintiff would not be so deplorable as to punish him by dismissing his suit.”

- 21.** In the present case also though the writ of summons were not issued but the defendants were aware that the plaintiff has filed the suit against them and the defendants were participating in the said interlocutory application and the defendant nos. 1, 2 and 3 have enclosed the copy of the plaint and connected documents in their application and thus the judgment relied by the plaintiff is squarely applicable in the present proceeding.
- 22.** In view of the facts and circumstances mentioned above, this Court finds that the plaintiff has shown sufficient cause for not issuance of writ of summons within the time thus, the plaintiff is granted two weeks time for issuance of writ of summons. Accordingly, **prayers (a) to (d) of GA No. 5 of 2023** are **allowed**. Consequently, **GA No. 6 of 2023** is thus **dismissed**.

(KRISHNA RAO, J.)

p.d/-