

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3679 OF 2012
[ARISING OUT OF S.L.P. (C) NO. 23938 OF 2011]

SILIGURI MUNICIPAL CORPORATION ... APPELLANT(s)

Versus

KRISHNA BAHADUR CHHETRI & OTHERS ... RESPONDENT(s)

O R D E R

Leave granted.

2. We have heard Mr. A.K. Ganguli, learned senior counsel for the appellant and Mr. Kalyan Banerjee, learned senior counsel for the respondent Nos. 1 & 2.

3. The Trial Court, while deciding the application for setting aside the ex-parte decree dated December 5, 2000 observed that the appellant (defendant No. 1) was not served with the summons in accordance with the Code of Civil Procedure, 1908 (for short "CPC") and service of notice of temporary injunction on the defendant No. 1 was no service in the suit. The Trial Court consequently by its order dated July 31, 2006 condoned the delay in making application for setting aside the ex-parte decree and set-aside the ex-parte decree subject to payment of costs of Rs. 1000/-.

4. Aggrieved by the order of the Trial Court, the present respondent Nos. 1 and 2 (plaintiffs in the suit) filed an application under Article 227 of the Constitution of India before the High Court of Calcutta.

5. The Single Judge of that court set-aside the order of the Trial Court passed on July 31, 2006. While doing so, the Single Judge held that the defendant Nos. 1 to 3 had the knowledge of the institution of the suit.

6. Mr. A.K. Ganguli, learned senior counsel for the appellant submitted that the High Court failed to keep in mind the distinction between the knowledge of institution of suit and knowledge of hearing of suit.

He submitted that there was nothing on record to show that the appellant had the knowledge of hearing of the suit and despite that knowledge, it did not appear before the Trial Court. In support of his submission, Mr. Ganguli placed reliance on a decision of this Court in Sushil Kumar Sabharwal vs. Gurpreet Singh and others¹.

7. Mr. Kalyan Banerjee, learned senior counsel for the respondent Nos. 1 and 2, on the other hand, invited our attention to the acknowledgement dated August 27, 1996 (page 45 of the paper book) and submitted that the acknowledgement clearly indicated that the appellant was ^{1 (2002) 5 SCC 377} served with the court notice. He also referred to paragraph 4 of the application under Order IX Rule 13 made by the appellant wherein it is stated that sometimes in the year 1997, summons of the suit were sent to the petitioners (appellant herein) and the said summons were received by the then in-charge of Law Section of the Siliguri Municipal Corporation who, in collusion with the plaintiffs, did not place/hand over the summons of the suit to the then Chief Executive Officer of the Siliguri Municipal Corporation for taking the necessary steps and i.e. why they could not appear in the suit. Mr. Kalyan Banerjee, thus, submitted that the appellant had the full knowledge of the suit and the proceedings therein.

8. The proceedings before the Trial Court in the above suit have been placed on record as Annexure A-1 along with I.A Nos. 3-4 of 2012. It transpires therefrom that the suit was filed by the plaintiffs (respondent Nos. 1 and 2) on August 21, 1996. Process fee and summons were not filed and September 9, 1996 was fixed for taking steps. The plaintiffs had also made an application under Order XXXIX Rules 1 and 2 of C.P.C. and on that application, notice was issued. It is not necessary to set out in detail the proceedings

that took place between August 23, 1996 to January 31, 1997. Suffice it to say that the proceedings of January 31, 1997 reveal that although plaintiffs had filed process fee, summons were filed only on March 3, 1997 for issuance through court and post. The return of the summons was fixed on April 22, 1997. On April 22, 1997, the Court recorded that summons have not returned back till now and fixed May 26, 1997 for return of the summons. On May 26, 1997, the Court recorded that summons upon defendants had not yet been served and fixed the matter for June 21, 1997. The proceedings of June 21, 1997 record that the defendant Nos. 1 to 3 had not taken any steps inspite of due service of summons, but on challenge being made that no service had been effected on defendant Nos. 1 to 3, nothing is available on the record to show that in fact summons had been served on the defendant Nos. 1 to 3 before June 21, 1997.

9. Though the order of the Trial Court placed on record suffers from many grammatical errors, but we reproduce hereunder the relevant part of that order

which reads as follows:

"On being seen the entire records it appears to me that on 3.3.97 summon was issued and 22.4.97 was fixed for return of SR on 22.4.97. no SR was returned. The order dated 26.5.97 speaks as plaintiffs in present by filing a hazari. Summon upon defendants not yet received as yet. The order passed on 21.6.97 by the then P.O. which reads thus:

The plaintiff file hazari. The defendant Nos. 1 to 3 take no steps ex-parte of defence service of summon. The summon upon the defendant No.4 returned unserved. So, the plaintiff to take step upon the defendant No. 4 by 12.8.97. This order is inviting the Order 9 Rule 6(A) of CPC which is this - If it is proved that the summons was duly reserved, the court may make an order that the suit shall be heard ex-parte. Inadvertently there is no mentioning as to service of summon was duly effected.

The plaintiffs of the Original Suit and OPS of the Misc. Case take claim of servicing of summon was duly effected and it is clear from Ex. A & C (service) of the plaintiffs had sent the notice of injunction upon the defendants

then the plaintiffs should have sent the summon with plaint by taking fresh step with prayer before court precisely because the law of equality may be illegible from illegible and clean hand of the plaintiffs might have established. Admittedly sending notice of injunction to a illegible Mayor of the Corporation is a meaningful to the extent compliance of competence with Order 39 Rule 3(c) 93(b) of CPC. But if it was not sent for the principal officer of the corporation obviously it leads anomalous and absurd. Where the corporate body has a principal officer then the defence with regards to the servicing of summon claimed to have been effected in accordance with the clause (b) of Rule 2 of Order 29 of CPC is not proper and equitable rather is has absurd results.

As a while, it is transpired that the petitioners especially the corporation was not served summon in accordance with the provision of CPC and mere serving the notice of injunction to the defendants by the plaintiff and being seal is not enough to substantiate the conduction of the plaintiff regarding step taken as per CPC is causing service of summons upon the defendant. When the plaintiff sent notice of the injunction in obviously the plaintiff should have sent the summons in the plaint to the defendants in order to keep the equality upholding. Further the court owing to in order inadvertently failed to cause the personal appearance of the defendant particularly the defendant No. 1 who is a corporate body where in the public interest is involved."

10. Consequently, the Trial Court set-aside the ex-parte decree. The High Court was persuaded by the fact that the defendant Nos. 1 to 3 had the knowledge of the institution of the suit. This Court in Sushil Kumar1 with reference to Order IX Rules 6 & 13 and Order V Rules 17 & 18 stated as follows:

"The High Court has overlooked the second proviso to Rule 13 of Order 9 CPC, added by the 1976 amendment which provides that no court shall set-aside a 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. It is the knowledge of the "date of hearing" and not the knowledge of "pendency of suit" which is relevant for the purpose of the proviso above said. Then the present one is not a case of mere irregularity in service of summons; on the facts it is a case of non-service of summons."

11. Having regard to the above legal position, we are unable to sustain the order of the High Court.

12. In view of the above, the order dated March 28, 2011 passed by the High Court is set-aside. The order of the Trial Judge passed on July 31, 2006 is restored. Civil Appeal is allowed as above. No order as to costs. The Trial Court is expected to conclude the suit as expeditiously as may be possible.

.....J.
(R.M. LODHA)

.....J.
(H.L. GOKHALE)

NEW DELHI
APRIL 20, 2012.

ITEM NO.43 COURT NO.7 SECTION XVI

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Civil) No(s).23938/2011

(From the judgement and order datded 28/03/2011 in CO No.3104/2006 of The HIGH COURT OF CALCUTTA)

SILIGURI MUNICIPAL CORPN Petitioner(s)

VERSUS

KRISHNA BAHADUR CHHETRI & ORS. Respondent(s)
(With appln(s) for exemption from filing O.T.,permission to file additional documents and with prayer for interim relief and office report)

Date: 20/04/2012 This Petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE R.M. LODHA
HON'BLE MR. JUSTICE H.L. GOKHALE

For Petitioner(s) Mr. A.K. Ganguli, Sr. Adv.
Ms. Barnali Basak, Adv.
Mr. T.V.George,Adv.
Mr. Maurya Sarkar, Adv.
Mr. Dushyant Kumar, Adv.
Mr. Rakesh Taneja, Adv.

For Respondent(s) Mr. Kalyan Banerjee, Sr. Adv.
Mr. Kunal Chatterji,Adv.

Ms. Maitrayee Banerjee, Adv.
Mr. S. Bose, Adv.
Mr. S. Muherjee, Adv.

: 2 :

UPON hearing counsel the Court made the following
O R D E R

Leave granted.

Appeal is allowed in terms of signed order. No order
as to costs

(Pardeep Kumar)
Court Master

(Renu Diwan)
Court Master

[SIGNED ORDER IS PLACED ON THE FILE]