

SUPREME COURT OF INDIA

Auto Cars

Vs.

Trimurti Cargo Movers Pvt. Ltd.

SLP.(C) No.14648 of 2017

(R.K.Agrawal and Abhay Manohar Sapre,JJ.,)

15.02.2018

JUDGMENT

Abhay Manohar Sapre,J.,

1. Leave granted.

2. This appeal is filed against the final judgment and order dated 24.04.2017 passed by the High Court at Calcutta in A.P.O. No.200 of 2017 in C.S.No.15/14 whereby the Division Bench of the High Court dismissed the appeal filed by the appellant herein and affirmed the order dated 18.08.2016 passed by the Single Judge of the High Court in GA No.766 of 2016, in consequence, affirmed the ex- parte decree dated 09.02.2015 in C.S. No.15 of 2014.

3. The controversy involved in the appeal lies in a narrow compass. However, few facts need mention infra to appreciate the controversy.

4. The appellant is defendant No.1 whereas respondent No.1 is the plaintiff and respondent Nos. 2 and 3 are defendant Nos.2 and 3 in the civil suit out of which this appeal arises.

5. The plaintiff (respondent No.1) filed a civil suit being C.S. No 15 of 2014 in the High Court at Calcutta on its original side against the defendants (appellant and respondent Nos.2 and 3) for recovery of Rs.1,43,18,537/- on 13.01.2014. The suit was based on some commercial dealings exchanged between the parties in relation to services and supply of goods etc.

6. It is, however, not necessary for the disposal of this appeal to refer in detail the facts on which the suit was founded to claim the amount in question from the defendants.

7. The summons of the suit was initially sent to the defendants at their place of business mentioned in the cause title of the plaint, which was shown at Aurangabad (MH). Since the defendants were not being served with the ordinary mode of service, the plaintiff sought permission to serve them with the substituted service by way of publication under Order V

Rule 20 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code"). The permission was granted to the plaintiff.

8. The summons dated 17.11.2014 was accordingly published in the Times of India (Pune Edition) and Dainik Bhaskar(Aurangabad Edition) on 25.11.2014. The summons, which was published in papers, reads as under:

“Advertisement

The Times of India, Tuesday, Nov. 25, 2014 C.S. No.15 of 2014 IN THE HIGH COURT AT CALCUTTA Ordinary Original Civil Jurisdiction Original Side M/s. Trimurti Cargo Movers Pvt. Ltd. a company incorporated under the Companies Act, 1956 having its registered office at 157-C, Lelin Sarani, Kolkata-700013, Police Station Tal Totlla within the aforesaid jurisdiction and branch office at 305, Shivam Chamber, S.V. Road, Goregaon, Mumbai-400062.

Plaintiff
Versus

1. M/s Auto Cars, a registered partnership firm having its office at Adalat Road, Aurangabad-4310001 outside the aforesaid jurisdiction and branch office at 39-A, Harish Mukherjee Road, Kolkata-700025.
 2. Mr. Venugopal Dhoot, Partner of M/s. Auto Cars of Adalat Road, Aurangabad-4310001 outside the aforesaid jurisdiction.
- Defendants

To,

1. Mr. Venugopal Dhoot, Partner of M/s. Auto Cars of Adalat Road, Aurangabad-4310001.
2. Mr. Raj Kumar Dhoot, Partner of M/s. Auto Cars of Adalat Road, Aurangabad-4310001

Dear Sir,

Notices hereby given under Order V Rule 20 of the Code of Civil Procedure, 1908 that the plaintiff above named had filed a suit against you before this Hon' ble High Court at Calcutta on or about 13.01.2014 inter alia praying for leave under Clause 12 of the Letters Patent, 1865 and claims and reliefs:

- (a) A decree of Rs.1,63,34,537/- against the defendant as pleaded in paragraph 14 above;

- (b) Interest at the rate of Rs.25% per annum;
- (c) Interim interest and interest upon judgment on the aforesaid decretal amount until realization;
- (d) Receiver;
- (e) Injunction;
- (f) Attachment;
- (g) Costs;
- (h) Such further or other relief(s) You are hereby required to cause an appearance to be entered for you in the office of the Registrar of this Court within 15 days from the service upon you by way of publication of this summons, exclusive of the day of such service and are summoned to appear before this Court in person or by an advocate of the court to answer the plaintiffs' claim on the day the case is set down for hearing, upon which date you must be prepared to produce all your witnesses or power upon which you intend to rely in support of your case.

You are hereby required to take notice that in default of your causing an appearance to be so entered the suit will be liable to be heard and determined in your absence.
Witness: Mrs. Manjula Chellur, The Chief Justice, At Calcutta aforesaid the 13th day of November, 2014.

Arka Kumar Ghosh
Master
17/11/14
(Santosh Kumar Ray)

Plaintiffs Advocate on Record 6 Kiran Shankar Roy Road 2nd Floor, Room No.707,
Kolkata-700001

9. The defendants did not appear in the case, as directed in the summons, therefore, the Court placed the defendants ex-parte and proceeded to decide the suit on merits in their absence and eventually on 09.02.2015 passed an ex-parte decree against the defendants for a sum of Rs.1,43,18,537/- together with simple interest @ 12% p.a. from 01.05.2013 till the date of payment.

10. On coming to know of passing of the decree against them, the defendants filed an application under Order IX Rule 13 of the Code on 08.03.2016 before the Court (GA No. 766/2016) praying therein for setting aside the ex-parte decree inter alia on the ground that the summons of the suit was not duly served on them, therefore, they had no knowledge of

filing of the suit by the plaintiff against them. The defendants also contended that their place of business is at Aurangabad whereas the summons in question was published in the daily newspaper, Times of India at Pune. The defendants, therefore, contended that due to this reason a case for setting aside of the ex-parte decree, as contemplated under Order IX Rule 13 of the Code, is made out and hence the ex-parte decree dated 09.02.2015 passed in Civil Suit No.15/2014 be set aside and the defendants be permitted to contest the suit on merits.

11. The plaintiff filed their reply and contested the application filed by the defendants. According to the plaintiff, there was no illegality or irregularity in the service of the summons on the defendants and since despite service of the summons made pursuant to the publication in the newspapers, the defendants failed to appear in the suit, therefore, they were not entitled to seek any indulgence nor entitled to seek setting aside of the decree under Order IX Rule 13 of the Code.

12. The Single Judge, by judgment dated 18.08.2016, dismissed the application filed by the defendants holding that the summons were duly served on them. The defendants felt aggrieved and filed appeal before the Division Bench of the High Court. By impugned judgment, the Division Bench dismissed the appeal and affirmed the judgment of the Single Judge.

13. The appellant (defendant No.1) felt aggrieved by the judgment of the Division Bench and filed the present appeal by way of special leave before this Court.

14. Heard Mr. Shekhar Naphade, learned senior counsel, for the appellant, Mr. S. Chakraborty, learned counsel for respondent No.1 and Mr. Shashibhushan P. Adgaonkar, learned counsel for respondent Nos.2 & 3.

15. Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeal and while setting aside the impugned judgment allow the application filed by the defendants under Order IX Rule 13 of the Code and, in consequence, set aside the ex parte decree 09.02.2015 passed in Civil Suit No. 15/2014 and restore the suit on its file for being tried on merits in accordance with law.

16. In our considered view, the issue involved in the appeal is required to be examined keeping in view Section 27, Appendix-B appended to the Code read with Order V Rule 20(3) and Order IX Rule 13 of the Code.

17. Section 27 of the Code deals with issuance of the summons to defendants. It says that where a suit has been instituted, summons may be issued to the defendant to appear and answer the claim and may be served in the "manner prescribed on such day" not beyond thirty days from the date of the institution of the suit.

18. The format of the summons, which is used for effecting service on the defendant, is prescribed in Appendix-B, Process No.I. So far as Calcutta is concerned, the State has

amended the format of the summons as Process No.IA. These formats are appended to the Code and read as under:

“APPENDIX B PROCESS No.1
SUMMONS FOR DISPOSAL OF SUIT (O.V, r. 1

and r.5)

(Title)

To

[Name,

description and place of residence.] Whereas

...has instituted a suit against you for you are hereby summoned to appear in this Court in person or by a pleader duly instructed (and able to answer all material questions relating to the suit, or who shall be accompanied by some person, able to answer all such questions, on the day of 19./20, at O’ clock in the noon, to answer the claim; and as the day fixed, for your appearance is appointed for the final disposal of the suit, you must be prepared to produce on that day all the witnesses upon whose evidence and all the documents upon which you intend to rely in support of your defence. Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence. Given under my hand and the seal of the Court, that Day of..... 19.../20 Judge.

Notice-1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce, on applying to the Court and on depositing the necessary expenses.

2. If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both.”

“Calcutta- After Form No.1, insert the following Form, namely:-

“No. 1A

SUMMONS TO DEFENDANT FOR ASCERTAINMENT WHETHER THE SUIT
WILL BE CONTESTED (O.V, rr. 1 and 5)

(Title)

To

[Name,

description and place of residence.]

WHEREAS has instituted suit against you for .. you are hereby summoned to appear in this Court in person or by a pleader duly instructed, and able to answer all material questions relating the suit on the day of 19.../20...., at O' clock in the noon in order that on that day you may inform the Court whether you will or will not contest the claim either in whole or in part and in order that in the event of your deciding to contest the claim either in whole or in part, directions may be given to you as to the date upon which your written statement is to be filed and the witness or witnesses upon whose evidence you intend to rely in support of your defence are to be produced and also the document or documents upon which you intend to relay.

Take notice that, in default of your appearance on the day before mentioned the suit will be heard and determined in your absence and take further notice that in the event of your admitting the claim either in whole or in part the Court will forthwith pass judgment in accordance with such admissions.

Given under my hand and the seal of the Court this day of 19 /20 Judge. Notice- If you admit the claim either in whole or in part you should come prepared to pay into Court the money due by virtue of such admission together with the costs of the suit to avoid execution of any decree which may be passed against your person or property, or both.” (w.e.f. 25-8-1927)”

19. The aforementioned format of Process No.I is uniformly prescribed for effecting service of summons which are issued under Order V Rules 1 and 5 of the Code. It is, however, noticed that so far as State of UP (Allahabad) is concerned, it has prescribed a special format of the summons for service under Order V Rule 20 whereas so far as Calcutta is concerned, it has not specifically prescribed any special format for effecting service under Order V Rule 20 of the Code on the defendant but has prescribed a special format for effecting service under Order V Rules 1 and 5 of the Code.

20. Since no specific format is prescribed for effecting service of the summons under Order V Rule 20 of the Code by Calcutta except prescribing a special format for effecting service under Order V Rules 1 and 5 of the Code, the format prescribed for service of summons under Order V Rules I and 5 of the Code is also used for issuance of summons for effecting service under Order V Rule 20 of the Code.

21. In the format prescribed in the Appendix-B Process No.I or No.IA (which is applicable to the case at hand because the suit in question originates from Calcutta), we find that there is a specific column in the summons where a “day, date, year and time” for defendant's appearance is required to be mentioned.

22. In other words, the legislature while prescribing the format of summons in the Code has provided one column where the Court is required to mention a specific “day, date, year and time” for the defendant's appearance in the Court to enable him to answer the suit filed against him/her. This is also the requirement prescribed under Section 27 of the Code as is clear from the words occurring therein “and may be served in the manner prescribed on such day” .

23. Order V Rule 20(3) provides that when the service is effected by way of publication by the orders of the Court, the Court has to fix "time" for the appearance of the defendant, as the case may require. In our opinion, this does not dispense with the requirement of mentioning the actual day, date, year and time for defendant's appearance in the Court because it is prescribed in format.

24. The expression “time” has to be read harmoniously and in juxtaposition with the requirement prescribed under Section 27 read with statutory format Process IA of Appendix-B appended to the Code.

25. Indeed, mentioning of the specific “day, date, year and time” in the summons is a statutory requirement prescribed in law (Code) and, therefore, it cannot be said to be an empty formality. It is essentially meant and for the benefit of the defendant because it enables the defendant to know the exact date, time and the place to appear in the particular Court in answer to the suit filed by the plaintiff against him.

26. If the specific day, date, year and the time for defendant's appearance in the Court concerned is not mentioned in the summons though validly served on the defendant by any mode of service prescribed under Order V, it will not be possible for him/her to attend the Court for want of any fixed date given for his/her appearance.

27. The object behind sending the summons is essentially threefold- First, it is to apprise the defendant about the filing of a case by the plaintiff against him; Second, to serve the defendant with the copy of the plaint filed against him; and Third, to inform the defendant about actual day, date, year, time and the particular Court so that he is able to appear in the Court on the date fixed for his/her appearance in the said case and answer the suit either personally or through his lawyer.

28. Now coming to the facts of the case, we find that the summons dated 17.11.2014, which was sought to be served on the defendants by publication published on 25.11.2014 in the Times of India and Dainik Bhaskar did not comply with the requirement of Section 27 read with Appendix-B (process) No.I and IA.

29. In other words, the summons dated 17.11.2004 published in the papers (Times of India and Dainik Bhaskar) had material infirmity therein, which rendered the summons so also the service made on the defendants bad in law.

30. The material infirmity in the summons was that it did not mention any specific day, date, year and time for the defendants' appearance in the Court. This being the requirement of Section 27 read with Order V Rule 20(3) and Process-IA of Appendix-B, it was mandatory for the Court to mention the specific working day, date, year and time in the columns meant for such filling. It would have enabled the defendants to appear before the Court on the date so fixed therein. It is a settled rule of interpretation that when the legislature provides a particular thing to be done in a particular manner then such thing has to be done in the same prescribed manner and in no other manner.

31. What was, however, mentioned in the summons in question was that the defendants should appear before the Registrar of the Court within 15 days from the service of publication of this summons on them exclusive of the day of such service of the summons and are summoned to appear before this Court in person or through advocate to answer the plaintiff's claim on the day the case is set down for hearing upon which date you(defendants) must be prepared to produce all your witness and all your documents in your possession or power upon which you intend to rely in support of your case. The summons then also mentioned that you (defendants) are hereby required to take notice that in default of your causing an appearance to be so entered, the suit will be liable to be heard and determined in your absence.

32. The aforesaid wording in the summons insofar as it pertains to giving 15 days' time without mentioning a specific day, date, year and time is not in conformity with the requirements of Section 27 read with Appendix B.

33. In the light of the foregoing discussions, service of summons on the defendants without mentioning therein a specific day, date, year and time cannot be held as "summons duly served" on the defendants within the meaning of Order IX Rule 13 of the Code. In other words, such summons and the service effected pursuant thereto cannot be held to be in conformity with Section 27 read with the statutory format prescribed in Appendix B Process (I and IA) and Order 5 Rule 20(3) of the Code.

34. It is for this reason, we are of the considered opinion that the appellant (defendant No.1) was able to make out a ground contemplated under Order IX Rule 13 of the Code for setting aside the ex parte decree.

35. Once the appellant (defendant No.1) is able to show that "summons were not duly served on him" as prescribed under Section 27 read with Appendix B Process IA and Order V Rule 20(3) of the Code then it is one of the grounds for setting aside the ex parte decree under Order IX Rule 13 of the Code. In our view, the appellant (defendant No.1) is able to make out the ground.

36. In view of the foregoing discussion, we need not consider any other ground though raised by the appellant(defendant No.1) in support of their case because the aforesaid ground which

we have dealt with though not raised by the appellant in the Courts below but being a pure question of law and going to the root of the matter affecting the very jurisdiction of the Court could be allowed to be raised in this Court for doing substantial justice.

37. Before parting, we consider it apposite to remind ourselves with the apt observations of a learned Judge - Vivian Bose, J., which His Lordship made while dealing with the scope of Order IX in a leading case of Sangram Singh vs. Election Tribunal (AIR 1955 SC 425).

38. The learned Judge speaking for the Bench in his distinctive style of writing reminded the Courts to keep the following observations in mind while deciding the rights of the parties which reads as under:

“A code of procedure must be regarded as such. It is procedure something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it. Our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.”

39. In the light of the foregoing discussion, the appeal succeeds and is allowed. The judgments of the Single Judge and Division Bench are set aside. The appellant's (defendant No.1) application filed under Order IX Rule 13 of the Code (GA No. 766/2016) is allowed. As a consequence, the ex parte decree dated 09.02.2015 passed in C.S. No. 15/2014 is set aside. The civil suit is restored to its original file.

40. Parties to appear before the concerned Court on 05.03.2018 to enable the Court to decide the suit. The appellant (defendant No.1) will be granted an opportunity to file the written statement. The Court will ensure disposal of the suit on merits in accordance with law within a year as an outer limit.

41. It was, however, brought to our notice that during the pendency of this appeal, the appellant was asked to deposit a sum of Rs.47.50 lakhs which they have deposited. Now that the suit is restored to its original file for its decision on merits, we make it clear that the deposit and withdrawal of Rs.47.50 lakhs would be subject to the final result of the suit.