

BOMBAY HIGH COURT

Meghji Kanji Patel

Vs

Kundanman Chamanlal Mehtani

(Nain, J.)

14.11.1967

ORDER

Nain ,J.

(1) The opponent filed on 22nd April 1964 a Summary Suit in the court of Small Causes against the petitioner, being suit No. 992/3041 of 1964 alleging that the amount of Rs. 3,000 was due to the opponent under receipt dated 1st May 1961 alleged to have been executed by the petitioner in favour of the opponent. The writ of Summons of the suit was sent to the petitioner by registered post, but the cover containing the same was returned unserved through the postal endorsement "refused". As the petitioner remained absent at the hearing of the suit, an ex parte decree was passed against him.

(2) The petitioner made an application to the Small Causes for setting aside the ex parte decree. In his application which was on oath, he stated that the registered letter containing the writ of summons was not tendered to him at any time. The learned Judge, however, refused to set aside the ex parte decree, inter alia, on the ground that under S. 114 of the Indian Evidence Act and S. 27 of the Indian General Clauses Act the posting of a letter in due course raises a presumption about effective service. I am afraid, the learned Judge has lost sight of the fact that sending of a letter by registered post merely raises a rebuttable presumption that the letter was delivered to the addressee. In a case where the addressee makes a statement on oath that such a letter was not tendered to him, the presumption stands rebutted. Mr. Gandhi has drawn my attention to the judgment of Mr. Chagla, the then Chief Justice of Bombay, in the case of Appabhai Motibhai v. Laxmichand Zaverchand and Co., in which it has been held that O. 5 R. 21A of the Code of Civil Procedure provides for substituted service. Ordinarily, service must be effected personally upon a defendant. Service by a registered post is a special facility to the court in these modern days to effect service by registered post. But even so that convenience must be properly circumscribed so as not to defeat the ends of justice and it would be a very serious thing if a defendant was not entitled to have an ex parte decree set aside although that decree was passed on an endorsement

made by a postman that the packet had been offered to the defendant and he had refused it. The learned Chief Justice held that, in his opinion, when the defendant came and stated that the registered letter containing a Summons was not tendered to him, the courts below were wrong in refusing to set aside the ex parte decree on the application made by the defendant. With the above judgment, I respectfully agree. Where an ex parte decree is passed after the writ of Summons has been sent to a defendant by registered post and the cover containing the Summons has been returned with the postal endorsement "refused" it is undoubtedly for the defendant to satisfy the court that the letter was not tendered to him. But the defendant can only do so by making a statement on oath. This must usually remain uncontroverted, unless the postman, who tendered the letter to him, is summoned and makes a statement that he tendered the cover containing the summons to the defendant and after cross-examination, his evidence is believed. In this case, the plaintiff did not summon the postman. The statement on oath of the defendant remained uncontroverted and, in my opinion, there was sufficient ground for setting aside the ex parte decree and, accordingly, I make an order setting aside the ex parte decree.

(3) After this revision application was admitted by this court and the petitioner made an application for stay of execution, as a condition precedent to the grant of stay, he was ordered to deposit a sum of Rs. 1700. Mr. Gandhi for the petitioner states that this sum of Rs. 1700 has been deposited in the court of Small Causes. Under O. 9, R. 13 of the Code of Civil Procedure, the Court may make an order setting aside the decree upon such terms as to payment to the Court or otherwise as it thinks fit. I make an order that the sum of Rs. 1700 deposited by the petitioner shall remain in court as a term on which the ex parte decree is set aside. The said amount shall remain deposit until the disposal of the suit and then abide by the orders of the court at the time of the disposal of the suit.

(4) I, therefore, allow this revision application, but make no order as to costs. The rule is made absolute.

(5) Revision allowed.